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The Role of Human Rights in Global Security Issues: A Normative and Institutional Critique

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THE ROLE OF HUMAN RIGHTS IN GLOBAL SECURITY ISSUES: A NORMATIVE AND INSTITUTIONAL CRITIQUE

*Douglas Lee Donoho**

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INTRODUCTION

In recent years it has become commonplace to suggest that there is a fundamental relationship between the observance of human rights and international peace. Western writers often argue that democratic governance enhances peace¹ and that observance of human rights generally

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1. See, e.g., Thomas M. Franck, *United Nations Based Prospects for a New Global Order*,

enhances the genuineness of democracy.² Nonwestern writers and governments also frequently link human rights to international peace and stability but tend to stress instead economic and social rights and the importance of economic development.³

While these views and their variations are largely untested empirically,⁴ there is considerable support among States, international organizations, and academics for the general proposition that human rights and

22 N.Y.U. J. INT'L L. & POL. 601, 621 (1990) [hereinafter Franck, *Prospects*]; Thomas M. Franck, *The Emerging Right To Democratic Governance*, 86 AM. J. INT'L L. 46, 88-90 (1992) [hereinafter Franck, *Democratic Governance*]; James A. R. Nafziger, *The Security of Human Rights: A Third Phase in the Global System?* 20 CAL. W. INT'L L.J. 173, 174-75 (1990). See also Dinah Shelton, *Representative Democracy and Human Rights in the Western Hemisphere*, 12 HUM. RTS. L.J. 353, 355 (1991). Some authors argue that the international community should make democratic governance one of the criteria for judging the legitimacy of governments. See, e.g., Franck, *Democratic Governance*, *supra*, at 76-77; W. Michael Reisman, Editorial Comment, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L L. 866, 868-70 (1990); Symposium, *Transitions to Democracy and the Rule of Law*, 5 AM. U. J. INT'L L. & POL'Y 965, 1065-66 (1990) (remarks of Jordan Paust). However, simply defining democratic governance and the rights to political participation is itself controversial. Henry J. Steiner, *Political Participation as a Human Right*, 1 HARV. HUM. RTS. Y.B. 77, 77-79, 84-91, 130 (1988); see *infra* text accompanying notes 60-71.

2. See, e.g., Panel, *New Prospects and Initiatives for a Revived United Nations*, 83 AM. SOC'Y INT'L L. PROC. 439, 451 (1989) (remarks of Herbert Reis); Panel, *The Human Right to Participate in Government: Toward an Operational Definition*, 82 AM. SOC'Y INT'L L. PROC. 505 (1988); see also HURST HANNUM, *AUTONOMY, SOVEREIGNTY AND SELF-DETERMINATION* 112-15 (1990) [hereinafter HANNUM, *AUTONOMY*]. It is often argued, particularly from the West, that liberal democratic institutions are necessary for the realization of human rights generally. See, e.g., Conference on Security and Cooperation in Europe (CSCE): Document of the Copenhagen Meeting of the Conference on the Human Dimension, 29 I.L.M. 1305, 1307-08 (1990) [hereinafter CSCE: *Copenhagen*]; Angela Cornell & Kenneth Roberts, *Democracy, Counterinsurgency and Human Rights: The Case of Peru*, 12 HUM. RTS. Q. 529, 531-32 (1990); Shelton, *supra* note 1, at 353; Nafziger, *supra* note 1, at 183. But see Symposium, *Transitions to Democracy and the Rule of Law*, *supra* note 1, at 1081-83 (remarks of Hurst Hannum) (noting that democracy itself does not necessarily lead to the realization of human rights or social and economic justice).

3. See, e.g., UNITED NATIONS, GENERAL ASSEMBLY, REPORT OF THE ECONOMIC AND SOCIAL COUNCIL; WORLD CONFERENCE ON HUMAN RIGHTS; REPORT OF THE SECRETARY-GENERAL, at 7 (comments of Cuba), 16 (Tunisia), U.N. Doc. A/45/564 (1990) [hereinafter WORLD CONFERENCE]. But see *The Realization of Economic, Social and Cultural Rights: Final Report Submitted by Mr. Danilo Türk, Special Rapporteur*, U.N. ESCOR, 44th Sess., Agenda Item 8, at 5-6, U.N. Doc. E/CN.4/Sub.2/1992/16 (1992) (noting recent shifts away from an orientation favoring economic and social rights). See also ANTONIO CASSESE, *INTERNATIONAL LAW IN A DIVIDED WORLD* 301, 307-11 (1986).

4. None of the authors cited in this article, for example, cite any direct empirical support for the proposition that observance of human rights will lead to peace. Two authors cite suspect historical studies which suggest that "democracies" (narrowly defined) do not wage war against each other. Franck, *Prospects*, *supra* note 1, at 621 n.76; Nafziger, *supra* note 1, at 174. Even if this limited proposition is true, however, it may only indicate that nations with similar economic, social, and political interests are less likely to resolve their disputes through warfare. In any case, the colonial history of the United States and Western Europe have amply demonstrated that democracy alone does not curb aggressive use of force.

international peace are causally linked.⁵ Thus, debate over human rights values now nearly always figures prominently in matters of international peace and security. Whether for sincere or cynical reasons, human rights have become an important part of the rhetoric of armed conflict. Similarly, many of the internal conflicts which threaten international peace relate directly to such fundamental human rights as self-determination and the still maturing collective rights of ethnic and linguistic minorities.⁶ This perceived linkage between peace and human rights is clearly reflected in the activities and pronouncements of the U.N.'s various political organs.⁷

Perhaps encouraged by this strong international perception that human rights are linked to peace, many commentators have urged a greatly increased role for human rights in the so-called new world order.⁸ These

5. See, e.g., *New International Humanitarian Order: Report of the Secretary-General*, U.N. GAOR, 45th Sess., Agenda Item 95, at 4-5 (comments of Byelorussian S.S.R.), 6 (Czechoslovakia), 8-9 (Mongolia), 10 (Panama), 11 (U.S.S.R.), U.N. Doc. A/45/524 (1990); WORLD CONFERENCE, *supra* note 3, at 8 (comments of Cyprus), 16 (Turkey); *Implementation of the Declaration on the Preparation of Societies for Life in Peace: Report of the Secretary-General*, U.N. GAOR, 44th Sess., Agenda Item 70, at 10-11 (comments of Poland), U.N. Doc. A/45/575 (1990); *Report of the Secretary-General on the Work of the Organization*, U.N. GAOR, 47th Sess., Supp. No. 1, ¶¶ 67, 81, 109, U.N. Doc. A/47/1 (1992) [hereinafter *Report on the Organization*]; S.C. Res. 253, U.N. SCOR, 23d Sess., 1428th mtg., U.N. Doc. S/RES/253 (1968) (Security Council proclaims that the denial of human rights and democracy in S. Rhodesia is a threat to peace); G.A. Res. 118, U.N. GAOR, 46th Sess., Supp. No. 49, U.N. Doc. A/RES/46/118 (1992) (human rights as one of the "keystones in the arch of peace"); CSCE: Final Act, 14 I.L.M. 1292, ch. VII (1975); see also sources cited *supra* note 1; Theo van Boven, *The Role of the United Nations Secretariat in the Area of Human Rights*, 24 N.Y.U. J. INT'L L. & POL. 69, 71-72 (1991).

6. See UNITED NATIONS, GENERAL ASSEMBLY, SECURITY COUNCIL, AN AGENDA FOR PEACE; PREVENTIVE DIPLOMACY, PEACEMAKING AND PEACE-KEEPING: REPORT OF THE SECRETARY-GENERAL, ¶¶ 5, 15, 18-19, U.N. Doc. A/47/277, S/24111 (1992) [hereinafter *AGENDA FOR PEACE*]; *Report on the Organization*, *supra* note 5, ¶ 90; see also Brenda Cossman, *Reform, Revolution, or Retrenchment? International Human Rights in the Post-Cold War Era*, 32 HARV. INT'L L. J. 339, 346-48 (1991). See generally HANNUM, *AUTONOMY*, *supra* note 2.

7. See, e.g., *AGENDA FOR PEACE*, *supra* note 6, ¶¶ 5, 15; S.C. Res. 794, U.N. SCOR, 47th Sess., 3145th mtg., U.N. Doc. S/RES/794 (1992) (Somalia); S.C. Res. 688, U.N. SCOR, 46th Sess., 2982d mtg., U.N. Doc. S/RES/688 (1991) (Iraqi Kurds); S.C. Res. 253, *supra* note 5 (S. Rhodesia); *Medium-Term Plan for the Period 1992-1997, Vol. II*, U.N. GAOR, 45th Sess., Supp. No. 6, ¶¶ 35.3, 35.4, 35.21, U.N. Doc. A/45/6/Rev. 1 (1991); *Report on the Organization*, *supra* note 5, ¶ 90.

8. See, e.g., Franck, *Democratic Governance*, *supra* note 1; Ved P. Nanda, *Tragedies in Northern Iraq, Liberia, Yugoslavia & Haiti: Revisiting the Validity of Humanitarian Intervention Under International Law, Part I*, 20 DENV. J. INT'L L. & POL'Y. 305 (1992); Nafziger, *supra* note 1; Reisman, *supra* note 1; Franck, *Prospects*, *supra* note 1; see also Martti Koskeniemi, *The Future of Statehood*, 32 HARV. INT'L L.J. 397, 397-400 (1991); Christianne Bourloyannis, *The Security Council of the United Nations and the Implementation of International Humanitarian Law*, 20 DENV. J. INT'L L. & POL'Y 335, 353-55 (1992); Stanley Anderson, *Human Rights and the Structure of International Law*, 12 N.Y.U. SCH. J. INT'L & COMP. L. 1, 26-28 (1991). Secretary-General Boutros-Ghali has also recently suggested an

reformers suggest, among other things, that the United Nations should look to human rights, and in particular rights associated with democratic governance, as a basis for collective decisions relating to peace and security. The precise role suggested for human rights depends upon the degree to which human rights are thought to justify collective international action based upon their relationship to peace. Thus, reform proposals range from amorphous arguments for a "new phase" in the global security system in which human rights considerations are directly "linked" to international peace and security issues,⁹ to human rights justifications for U.N. intervention.¹⁰ Some authors have promoted selected human rights — largely civil and political rights favored by Western liberal democracies — as suitable for various levels of enforcement action by the political organs of the United Nations. One prominent commentator, for example, has presented a series of arguments favoring a significant role for "democratic entitlement" rights at the United Nations and within international relations generally.¹¹ Similar arguments have been developed on the basis of the right to self-determination.¹² All of these arguments in some fashion involve the issues raised by the longstanding

increased role for human rights considerations in the work of the Security Council. See *Report on the Organization*, *supra* note 5, ¶ 101 (urging authorization for the Secretary-General and human rights institutions to report on human rights abuses and make recommendations for action to the Security Council).

9. See Nafziger, *supra* note 1, at 173–84.

10. See, e.g., Nanda, *supra* note 8, at 305–06, 311, 330–34; Kevin Ryan, *Rights, Intervention, and Self-Determination*, 20 DENV. J. INT'L L. & POL'Y 55, 57–61 (1991); Michael J. Bazylar, *Reexamining the Doctrine of Humanitarian Intervention in Light of the Atrocities in Kampuchea and Ethiopia*, 23 STAN. J. INT'L L. 547, 598 n.242, 602–03, 616 (1987). See also Bourloyannis, *supra* note 8, at 339–52. Some authors have also argued in favor of unilateral human rights intervention under specified conditions. See, e.g., Anthony D'Amato, *The Invasion of Panama Was a Lawful Response to Tyranny*, 84 AM. J. INT'L L. 516 (1990); Fernando R. Tesón, *Interdependence, Consent, and the Basis of International Obligation*, 83 AM. SOC'Y INT'L L. PROC. 558, 563 (1989); Reisman, *supra* note 1, at 871–72; see also W. Michael Reisman, Editorial Comment, *Coercion and Self-Determination: Construing Charter Article 2(4)*, 78 AM. J. INT'L L. 642 (1984); Panel, *The Challenge of Universality*, 83 AM. SOC'Y INT'L L. PROC. 547 (1989). But see Oscar Schachter, Editorial Comment, *Legality of Pro-Democratic Invasion*, 78 AM. J. INT'L L. 645 (1984).

11. Franck, *Prospects*, *supra* note 1, at 621, 625–40; Franck, *Democratic Governance*, *supra* note 1, at 46. Professor Franck argues, among other things, that a government should be declared illegitimate and denied the "benefits of ... membership" if the international community determines that the government has denied its citizens democratic entitlement rights. See Franck, *Prospects*, *supra* note 1, at 638–39. See generally Reisman, *supra* note 1, at 869–72.

12. See, e.g., Ryan, *supra* note 10, at 61–66; see also James A. R. Nafziger, *Self-Determination and Humanitarian Intervention in a Community of Power*, 20 DENV. J. INT'L L. & POL'Y 9, 12–20 (1991). The concept of self-determination is also critical to arguments favoring collective action to support democratic entitlement rights. See, e.g., Franck, *Democratic Governance*, *supra* note 1, at 52–60; Symposium, *Transitions to Democracy and the Rule of Law*, *supra* note 1, at 1065–67 (remarks of Jordan Paust); see also Reisman, *supra* note 1, at 871–72; Reisman, *supra* note 10, at 643–45.

controversy over human rights-based "humanitarian intervention."¹³

These arguments suggest a wide spectrum of roles for human rights in a revised U.N. security system and alternative approaches to human rights reform generally. At one end of the spectrum are what might be called strong enforcement-oriented reform models in which human rights considerations would be directly utilized by U.N. political institutions as the basis for collective enforcement actions. This approach implies a range of possible enforcement actions depending upon the rights involved and the perceived strength of the causal connection between those rights and peace.¹⁴ Most fundamentally, enforcement-oriented reforms suggest that important U.N. decisions regarding a whole range of actions affecting peace and security are to be made, at least in part, on the basis of human rights considerations.

At the other end of the spectrum are what could be described as promotion-oriented reform models in which the United Nations would increase its efforts, through institutional reforms, to promote adherence to human rights as a subsidiary means of enhancing the prospects for global peace.¹⁵ This more moderate approach to reform might suggest, for example, that the link between human rights and peace justifies significant institutional reforms which could make human rights more definitive, subject to more effective multilateral supervision, and less susceptible to rationalizing justifications or unilateral State action.

13. Arguments for U.N. reform incorporating human rights considerations are closely related to the continuing debate over the propriety of "humanitarian intervention" outside of the U.N. framework. See, e.g., Nafziger, *supra* note 12, at 21-27; Nanda, *supra* note 8, at 307-11. See generally Tom J. Farer, *Human Rights in Law's Empire: The Jurisprudence War*, 85 AM. J. INT'L L. 117 (1991); Bazzyler, *supra* note 10, at 569-96 (reviewing the doctrine's history and providing numerous descriptive citations); Ryan, *supra* note 10; Reisman, *supra* note 10; Schachter, *supra* note 10; FERNANDO R. TESÓN, *HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY* (1988).

14. Some authors contemplate the use of force including armed intervention. Nanda, *supra* note 8, at 305-06, 311-31; Nafziger, *supra* note 12, at 31; Bazzyler, *supra* note 10, at 581-96, 607-18. Historically, however, there has been little if any State support for the arguments favoring military intervention to prevent human rights violations, whether based upon multilateral decision-making or not. See Schachter, *supra* note 10, at 646-48; Farer, *supra* note 13, at 121-22. Indeed, the international community has shown a marked reluctance to intervene in the affairs of sovereign countries even on the basis of the most egregious human rights violations. See, e.g., Roger S. Clark, *The "Decolonization" of East Timor and the United Nations Norms on Self-Determination and Aggression*, 7 YALE J. WORLD PUB. ORD. 2 (1980); Bazzyler, *supra* note 10, at 578 n.134, 595-96. Other advocates of utilizing human rights in U.N. security decisions believe that only non-forcible sanctions to support human rights are advisable. See, e.g., Franck, *Prospects*, *supra* note 1, at 639-40.

15. The United Nations has taken some preliminary, tentative steps towards such institutional reform of the U.N. human rights system. See, e.g., *Effective Implementation of International Instruments on Human Rights, Including Reporting Obligations Under International Instruments on Human Rights: Note by the Secretary-General*, U.N. GAOR, 44th Sess., Agenda Item 109, U.N. Doc. A/44/668 (1989) [hereinafter *Report on Implementation*]; *Medium-Term Plan for the Period 1992-1997: Volume II*, *supra* note 7, at 180-82.

The purpose of this article is to evaluate the institutional and normative capacity of international human rights to effectively serve such enhanced roles in global peace and security matters. In particular, the analysis focuses on key normative and institutional weaknesses in the existing U.N. human rights system and addresses their implications for the roles which human rights might serve to enhance peace. By describing some of the system's fundamental weaknesses, this analysis also indicates important areas for reform within the U.N. system.

Part I below develops a set of criteria for evaluating the effectiveness and credibility of international norms and institutions. Part II utilizes those criteria to explore weaknesses in the existing human rights normative framework, including significant textual indeterminacy, unresolved conflicts between rights, and the need for more uniformity and coherence in the sources and content of States' human rights obligations. Part III critiques related weaknesses in the U.N.'s human rights decision-making and interpretive capacity.

Overall, the following analysis suggests that significant institutional reforms will be necessary if international human rights, including rights relating to democratic governance, are to play an increased and positive role in maintaining peace. Indeed, given the current institutional immaturity of human rights it is conceivable that use of existing human rights norms as a basis for collective security actions would lead to increased, not lessened, world tensions. Among other things, the United Nations must radically strengthen its human rights decision-making capacity, particularly its ability to credibly determine facts and to develop authoritative interpretations of the specific content and meaning of indeterminate human rights norms.

I. ATTRIBUTES OF EFFECTIVE INTERNATIONAL NORMS AND INSTITUTIONS

In order to evaluate the normative and institutional capacity of the U.N. human rights regime to serve an enhanced role in global security, it is first necessary to describe the attributes which those norms and institutions must possess to achieve that task. Toward this end, it is instructive to examine factors that commentators have commonly associated with effective international law and institutions.¹⁶

16. "Effective" here is primarily meant in the functionalist sense common to international law. See CASSESE, *supra* note 3, at 26-28. It is important to consider, however, that the capacity of rules and institutions to achieve stated objectives and command compliance from those affected is not the only, nor arguably the most important, criterion for evaluating a legal regime. Arguably, attainment of substantive justice is also an important criterion upon which to judge international law and institutions. Compare Dencho Georgiev, *Letter to the Editor*, 83 AM. J. INT'L L. 554 (1989) with Thomas M. Franck, *Is Justice Relevant To the International*

H.L.A. Hart has characterized international law as similar to a primitive legal system.¹⁷ According to Hart, a mature, effective legal system relies on a hierarchy of rules and related decision-making processes.¹⁸ Primary rules of obligation constitute the basic substantive norms which govern social behavior.¹⁹ Critical to their function, however, are a series of "secondary rules" which govern the process of making, applying, and interpreting these primary substantive norms.²⁰ This hierarchy of rules, and rules about rules, is cemented together and ultimately rendered effective by the existence of "rules of recognition" which provide authority for identifying and validating the other rules.²¹ Hart sees international law as primitive essentially because its hierarchy of secondary rules remains underdeveloped, and it lacks ultimate rules of recognition.²² Process-oriented critiques of international law such as Hart's, along with more positivistic approaches emphasizing the international system's lack of a unified coercive sovereign, have commonly been

System?, 64 NOTRE DAME L. REV. 945 (1989). See also THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 45-46, 211-46 (1990) [hereinafter FRANCK, LEGITIMACY]; RONALD DWORKIN, LAW'S EMPIRE 96-104, 176-224, 403-07 (1986); H.L.A. HART, THE CONCEPT OF LAW 151-201, 221-26 (1961).

17. HART, *supra* note 16, at 208-31.

18. *Id.* at 89-96. This general descriptive assertion is common among non-Marxist Western legal scholars. See, e.g., DWORKIN, *supra* note 16, at 410-13. Hart's focus on process is shared by much of modern international law scholarship. See David Kennedy, *A New Stream of International Law Scholarship*, 7 WIS. INT'L L.J. 1, 30-34 (1988).

19. HART, *supra* note 16, at 77-96. Rules prohibiting theft and murder, for example, constitute basic primary rules of obligation in most domestic legal systems. Within international law, U.N. Charter Article 2(4)'s prohibition against the use of force and rules regarding States' territorial seas would satisfy Hart's description of such primary rules.

20. *Id.* These secondary rules of change, interpretation, and adjudication are process-oriented rules such as those controlling evidence for appointed fact-finders, allowing repeal of legislation, or determining violations of primary rules. Hart believes that international law is severely underdeveloped in this regard — though it can be argued that international rules on treaty interpretation and the formation of customary law, as well as the significant use of international courts and arbitrators, are viable examples of such secondary rules.

21. *Id.* at 92-94, 97-107. Of special significance among a legal system's secondary rules are these "rules of recognition" which, among other things, provide criteria for identifying and validating primary rules of obligation. For Hart these rules of recognition may take the form of an authoritative text, e.g., the U.S. Constitution, or rules requiring that laws be enacted by a prescribed legislative process. "Ultimate" rules of recognition provide criteria for assessing the validity of other rules. According to Hart, the international system lacks such rules — though he recognizes that it can be argued that rules such as *pacta sunt servanda* (treaties must be obeyed) and provisions of the U.N. Charter fulfill these roles. Professor Franck argues that rules about statehood and membership in the international community provide international law with the necessary rules of recognition. See FRANCK, LEGITIMACY, *supra* note 16, at 183-94.

22. *Id.* at 208-31. Hart rejects the claim that coercive sanctions imposed by the sovereign explain, or are even prerequisite to, enforceable, valid law. See *id.* at 47-70. He nevertheless clearly recognizes the significance of sovereign authority particularly as its absence may adversely affect the enforceability of international law. See *id.* at 21-25, 82-85, 211-21.

used to evaluate international law and the human rights system.²³

A number of commentators have produced important responses to Hart, as well as the more positivistic critiques of international law, in an effort to explain how international law and human rights can effectively function in the absence of a paramount sovereign and an organized system of enforceable sanctions.²⁴ Authors such as Professor Anthony D'Amato have tried to squeeze international law into traditional sanction-based enforcement theories of law. For example, D'Amato has argued that enforcement of international law takes place through a loose system of granting and withholding the "entitlements" of statehood. Similarly, State compliance with international law norms is a function of the expectation of reciprocal benefits and detriments or "retaliations" associated with non-compliance.²⁵ Specifically with regard to human rights, D'Amato argues that such rights form part of each State's international entitlements which if violated may justify various retaliatory sanctions including deprivation of the violator's other international entitlements.²⁶

Other authors have de-emphasized the role of sanctions and enforcement in explaining how international law can create obligations and induce State compliance. Oscar Schachter, for example, has argued that international law norms become "obligatory" when the actors addressed perceive that the lawmaker has the appropriate competence and authority.²⁷ International norms become "authoritative (legitimate)" when created or carried out "by entities which are appropriate decision-makers

23. See, e.g., FRANCK, *LEGITIMACY*, *supra* note 16; Gennady M. Danilenko, *The Changing Structure of the International Community: Constitutional Implications*, 32 HARV. INT'L L. J. 353, 353-57 (1991); J.S. Watson, *Legal Theory, Efficacy and Validity in the Development of Human Rights Norms in International Law*, 1979 U. ILL. L. F. 609 (1979); Stanley Anderson, *Human Rights and the Structure of International Law*, 12 N.Y.L. SCH. J. INT'L & COMP. L. 1 (1991); see also Koskeniemi, *supra* note 8, at 397-400, 402-05, 407-10.

24. Proposals for an increased role for human rights in a reformed United Nations could conceivably call for a restructuring of current enforcement mechanisms under the Charter. It is important to note, however, that most authors implicitly assume that the existing Charter structure will remain essentially unchanged and focus their attention on expanding the acceptable bases for various enforcement actions. *But see* Franck, *Prospects*, *supra* note 1, at 615-21 (arguing that the U.N.'s political institutions lack legitimacy and should be restructured). Given the lingering power of State sovereignty, non-intervention in domestic affairs, State equality, and nationalism, this appears to be a sound assumption. Thus, the analysis which follows assumes that the Security Council will remain the only source of binding, collective enforcement actions utilizing existing voting procedures.

25. Anthony D'Amato, *The Concept of Human Rights in International Law*, 82 COLUM. L. REV. 1110, 1110-22 (1982) [hereinafter D'Amato, *The Concept of Human Rights*]; see also ANTHONY D'AMATO, *INTERNATIONAL LAW: PROCESS AND PROSPECT* chs. 1-2 (1987).

26. D'Amato, *The Concept of Human Rights*, *supra* note 25, at 1112, 1120-27. *But see* Watson, *supra* note 23, at 609, 614-15, 618-19.

27. Oscar Schachter, *Towards a Theory of International Obligation*, 8 VA. J. INT'L L. 300, 307-10 (1968).

for that purpose and in accordance with procedures which are considered as appropriate."²⁸ The test, according to Schachter, is an empirical evaluation of "legitimacy and effectiveness" with legitimacy being both psychological and political. Factors which create this perception of authority include "formal indicia of authority" — including proper procedures and "linguistic symbols", the "context" in which the lawmaker acts, some means of carrying out decisions, and the representative character of the lawmaker.

Developing a similar theory based upon the work of Hart²⁹ and Ronald Dworkin,³⁰ Professor Thomas Franck claims that States comply (most of the time) with those international rules which are perceived as the "legitimate" product of "right process."³¹ The more that the international community perceives that a rule or institution is legitimate, the greater degree of "compliance pull" that norm or institution will have on State behavior.³² According to Franck, there are four characteristics which provide international norms and institutions with varying degrees of legitimacy:³³ (1) "determinacy" (ability to communicate clear meaning);³⁴ (2) "symbolic validation" ("pedigree" and cultural authenticity);³⁵ (3) "coherence" (consistency in application and internal logic);³⁶ and (4) "adherence" (consistency with the overall hierarchy of rules governing the international system).³⁷ The concept of legitimacy, in a variety of forms, has also been identified as a significant element in

28. *Id.* at 311-12, 314.

29. Franck uses Hart's jurisprudential theories but disagrees with Hart's evaluation of the international legal system, particularly concerning the existence of ultimate rules of recognition and the maturity of international law's so-called "secondary rules" (i.e. process rules of change and adaptation). See FRANCK, *LEGITIMACY*, *supra* note 16, at 183-87.

30. Franck draws heavily upon Dworkin's jurisprudence as developed in *LAW'S EMPIRE*, *supra* note 16. See FRANCK, *LEGITIMACY*, *supra* note 16, at 15-19, 143-53, 202. Franck also draws liberally from the sociological theories of legitimacy presented by Max Weber and Jürgen Habermas. See *id.* at 15-19. For an insightful critique of these and other theories about legitimacy in law see generally Alan Hyde, *The Concept of Legitimation in the Sociology of Law*, 1983 WIS. L. REV. 379 (1983).

31. FRANCK, *LEGITIMACY*, *supra* note 16, at 19-22, 25-26, 49, 64-66, 80-83, 87.

32. *Id.* at 25, 38-39, 45-49, 174, 187, 193-99.

33. Franck does not purport to describe a self-sufficient, comprehensive account of State compliance. Rather, his analysis of legitimacy and its four primary characteristics is presented as merely a "hypothesis" about rule compliance in international law. *Id.* at 45-49.

34. *Id.* at 52-60. A vital corollary to textual determinacy for Franck is the process of providing indeterminate textual norms with content through interpretation and application. Franck describes this well-known phenomenon as "process determinacy." See *id.* at 61-67, 86-87.

35. *Id.* at 91-96.

36. *Id.* at 135-53, 180-81.

37. *Id.* at 183-93.

domestic legal systems.³⁸ Franck's account of State compliance with international law and the role of "legitimacy" also purports to describe and predict the effectiveness of international institutions.³⁹

Others have pointed out that compliance with international norms may depend upon the coalescence of myriad factors including self-interest,⁴⁰ economic pressures, political consensus, fear of sanctions, and, at least partly, habit or culture.⁴¹ Ultimately, all of these factors may revolve around the violating State's fear of losing the benefits of membership in the international community.⁴² Human rights advocates have also long emphasized the importance of intangible factors such as moral suasion and the "mobilization of shame" in promoting compliance by recalcitrant States. Indeed, human rights have demonstrated their own dynamic as a catalyst of change which is not readily explained solely by the factors normally associated with State compliance with international law norms.

The various characteristics of effective international legal norms and institutions which these commentators have described provide valuable insights. Taken together, these insights indicate that in order to function effectively as a basis for collective security actions within a reformed United Nations, human rights and the U.N. system must provide: (1) well-defined norms with a significant degree of commonly understood meaning and content; (2) an accepted process of authoritatively interpreting such norms to elaborate standards, resolve conflicts, and develop specific contextual meaning; and (3) a credible, fair decision-making process through which to determine the facts that establish violations and justify appropriate collective responses.

As described below, there are a number of significant normative and institutional weaknesses in the existing U.N. human rights system which

38. See generally Hyde, *supra* note 30, at 387-89, 392-93, 397, 423 (providing a useful description and critique of legitimacy in the sociology of law).

39. FRANCK, *LEGITIMACY*, *supra* note 16, at 51, 64-65. For an insightful critique of Franck's account of legitimacy in explaining the effectiveness of international institutions see Jose E. Alvarez, *The Quest for Legitimacy: An Examination of THE POWER OF LEGITIMACY AMONG NATIONS* by Thomas Franck, 24 N.Y.U. J. INT'L L. & POL. 199 (1991).

40. International relations scholars, steeped in the tradition of political realism, often suggest that it is primarily self-interest that dictates State behavior rather than any fidelity to international law. See generally Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 YALE J. INT'L L. 335, 337-38 (1989).

41. See Alvarez, *supra* note 39, at 226-29; see also FRANCK, *LEGITIMACY*, *supra* note 16, at 37, 41-49, 204.

42. See FRANCK, *LEGITIMACY*, *supra* note 16, at 38-39, 190-202; D'Amato, *The Concept of Human Rights*, *supra* note 25, at 1110-22. Franck posits that membership in the international community and the rules of behavior associated with such membership supply the ultimate "rules of recognition" identified by Hart as critical to an effective, mature legal system with the power to induce compliance. See FRANCK, *LEGITIMACY*, *supra* note 16, at 187, 190-92. See also Danilenko, *supra* note 23.

must be addressed at each of these levels if human rights are to occupy a more prominent and effective position in a reformed United Nations.⁴³

II. THE NEED FOR WELL-DEFINED NORMATIVE STANDARDS: WEAKNESSES IN THE HUMAN RIGHTS NORMATIVE FRAMEWORK

A comprehensive network of human rights norms are now firmly entrenched as part of international law.⁴⁴ The Universal Declaration of Human Rights⁴⁵ has won nearly universal acceptance at least at some level of understanding.⁴⁶ Major multilateral human rights treaties such as the Civil and Political Rights Covenant;⁴⁷ the Economic, Social and Cultural Rights Covenant;⁴⁸ the Convention on the Elimination of All

43. The present article focuses on U.N. human rights institutions and existing human rights norms. Proposals for enhancing global security through human rights could require the development of new international norms or institutions. In addition, the U.N.'s main political bodies, the General Assembly and Security Council, would inevitably play critical decision-making roles if human rights considerations were to become an important factor in global security issues. There are important questions about the effectiveness, credibility, and legitimacy of decision-making at these institutions. See, e.g., Franck, *Prospects*, *supra* note 1, at 614-21; Thomas M. Franck, *Soviet Initiatives: U.S. Responses — New Opportunities for Reviving the United Nations System*, 84 AM. J. INT'L L. 531 (1989).

44. A recent U.N. report on improving implementation of human rights found 65 different U.N. sponsored instruments in operation within the U.N. human rights system. See *Report on Implementation*, *supra* note 15, ¶ 22. See also Theo van Boven, *The Future Codification of Human Rights: Status of Deliberations — A Critical Analysis*, 10 HUM. RTS. L.J. 1, 2 (1989) (noting 67 human rights instruments adopted by the United Nations); COMPILATION OF HUMAN RIGHTS INSTRUMENTS, U.N. Doc. ST/HR/1/REV.3, U.N. Sales No. E.88.XIV.1 (1988) (listing 67 human rights instruments adopted by the United Nations as of 1989). Among these instruments are six major multilateral treaties with monitoring bodies having responsibility over approximately 533 State Parties cumulatively. *Report on Implementation*, *supra* note 15, ¶¶ 15-16. See Theodore Meron, *Norm Making and Supervision in International Human Rights: Reflections on Institutional Order*, 76 AM. J. INT'L L. 754 (1982). In addition, there are three major regional human rights networks in Europe, the Americas, and Africa respectively. Each of these systems has created a relatively comprehensive set of operative human rights norms. See generally Richard B. Bilder, *An Overview of International Human Rights Law*, in GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE 3 (Hurst Hannum ed., 1984) (citing 20 important multilateral human rights treaties).

45. G.A. Res. 217A (III), U.N. GAOR, 3d Sess., pt. 1, at 71, U.N. Doc. A/810 (1948) [hereinafter Universal Declaration].

46. While nearly every State has expressed some endorsement of the Universal Declaration, see, e.g., FINAL ACT OF THE INTERNATIONAL CONFERENCE ON HUMAN RIGHTS at 4, U.N. Doc. A/Conf.32/41, U.N. Sales No. E.68.XIV.2 (1968); *Setting International Standards in the Field of Human Rights*, G.A. Res. 120, U.N. GAOR, 3d Comm., 41st Sess., Supp. No. 53, at 178, U.N. Doc. A/41/53 (1986), questions linger about the meaning and depth of this acceptance. See, e.g., Adamantia Pollis & Peter Schwab, *Human Rights: A Western Construct with Limited Applicability*, in HUMAN RIGHTS: CULTURAL AND IDEOLOGICAL PERSPECTIVES 1 (Adamantia Pollis & Peter Schwab eds., 1979); Alison Dundes Renteln, INTERNATIONAL HUMAN RIGHTS: UNIVERSALISM VERSUS RELATIVISM 30-32, 51-54 (1990).

47. International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, S. EXEC. DOC. E, 95th Cong., 2d Sess. (1979), 999 U.N.T.S. 171 [hereinafter CPRC].

48. International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 19, 1966, S. EXEC. DOC. D, 95th Cong., 2d Sess. (1979), 993 U.N.T.S. 3 [hereinafter

Forms of Racial Discrimination;⁴⁹ and the Convention on the Elimination of All Forms of Discrimination Against Women⁵⁰ each have over ninety State Parties.⁵¹ Based on this achievement, academics and U.N. experts have increasingly suggested that the U.N. human rights system has basically completed its normative framework.⁵²

It is important, however, not to confuse the completion of a comprehensive network of abstract norms with the need for their continuing development. The international human rights normative framework suffers from fundamental weaknesses which must be addressed if human rights considerations are to play a prominent and positive role in global security issues. These weaknesses include significant indeterminacy,⁵³

ESCRC].

49. International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, S. EXEC. DOC. C, 95th Cong., 2d Sess. (1979), 660 U.N.T.S. 195 [hereinafter CERD].

50. Convention on the Elimination of All Forms of Discrimination against Women, *opened for signature* Mar. 1, 1980, S. EXEC. DOC. R, 96th Cong., 2d Sess. (1980), 1249 U.N.T.S. 13 [hereinafter CEDAW].

51. As of September 1990 ESCRC, CPRC, and the CPRC Optional Protocol had 97, 92, and 50 State Parties respectively. UNITED NATIONS, GENERAL ASSEMBLY, INTERNATIONAL COVENANTS ON HUMAN RIGHTS; STATUS OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS AND THE OPTIONAL PROTOCOLS TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS; REPORT OF THE SECRETARY-GENERAL, U.N. DOC. A/45/403 (1990). As of August 1990 CERD had 129 State Parties, 14 of which had consented to the convention's individual complaint mechanism. UNITED NATIONS, GENERAL ASSEMBLY, ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION; STATUS OF THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION; REPORT OF THE SECRETARY-GENERAL, U.N. DOC. A/45/402 (1990) [hereinafter REPORT ON THE STATUS OF CERD]. As of August 1990 CEDAW had 103 State Parties. UNITED NATIONS, GENERAL ASSEMBLY, ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN; REPORT OF THE SECRETARY-GENERAL ¶ 9, U.N. DOC. A/45/426 (1990). With a potential of over 180 State Parties a fair question is whether the glass is half-empty or half-full.

52. *See Report on Implementation*, *supra* note 15, ¶¶ 126, 137-39, 148; van Boven, *supra* note 44, at 1-3 (noting that while some analysts question whether new norm creation is needed, most U.N. organs see the need for further standard setting, especially regarding disadvantaged groups). Indeed, it has been suggested that the world has reached a saturation point in the creation of human rights norms and that continuing efforts to create new norms may detract from more important human rights concerns. *See Report on Implementation*, *supra* note 15, ¶¶ 110, 149; Panel, *Reforming United Nations Human Rights Law Making*, 80 AM. SOC'Y INT'L L. PROC. 175, 187 (1985) (remarks of David Weissbrodt). There appears to be a developing consensus that it is time for the United Nations to focus its efforts on problems of implementation. *See* G.A. Res. 120, *supra* note 46; WORLD CONFERENCE, *supra* note 3, at 10-11 (comments of Ireland), 14 (Sweden), 15 (Switzerland), 23 (U.N. Sub-Commission); *see also Report on Implementation*, *supra* note 15, ¶¶ 22, 143-44; van Boven, *supra* note 44, at 3, 5-6; Francesco Capotorti, *Human Rights: The Hard Road Towards Universality*, in THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW 977, 977-78 (R.St.J. Macdonald & Donald M. Johnston eds., 1983); Shelton, *supra* note 1, at 353-55; Franck, *Democratic Governance*, *supra* note 1, at 78.

53. As discussed below, the significance of textual indeterminacy is primarily a function of related weaknesses in the system's institutional decision-making capacity. *See infra* text

unresolved conflicts between rights, and a lack of uniformity or coherence in the sources and content of State obligations.⁵⁴

A. The Problem of Indeterminacy

Perhaps the most fundamental weakness in the present human rights normative framework is its continuing textual and interpretive indeterminacy. To varying degrees depending upon the right, the catalogue of rights consists of extremely vague, generally stated principles.⁵⁵ Many important rights are described in highly elastic terms such as rights to "equal protection of the law," "freedom of thought," "self-determination," "work," "just and favorable conditions of work," "an adequate standard of living," and prohibitions against "discrimination."⁵⁶ While some

accompanying notes 113-31.

54. The effectiveness and credibility of the U.N.'s human rights normative and institutional framework also suffers from unresolved, lingering conflict between international supervision and enforcement of rights and the fundamental international law principles of non-interference in domestic affairs and equal sovereignty among States. See, e.g., Capotorti, *supra* note 52, at 977-78; CASSESE, *supra* note 3, at 148-49; Watson, *supra* note 23, at 609-10; see also Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT'L L. 413 (1983). The important issues raised by these lingering tensions and contrasting State approaches to them are, however, well beyond the scope of this article.

55. See Douglas L. Donoho, *Relativism Versus Universalism in Human Rights: The Search for Meaningful Standards*, 27 STAN. J. INT'L L. 345, 368-69, 382-86 (1991); see also Steiner, *supra* note 1, at 77-86; Koskeniemi, *supra* note 8, at 399-400, 405-06. But see DAVID P. FORSYTHE, *THE INTERNATIONALIZATION OF HUMAN RIGHTS* 39-41 (1991) (arguing that the indeterminacy of human rights "can be overstated"). The analysis in this article focuses almost entirely on indeterminacy in the sense of a rule's ability to convey (usually via some text as in the case of treaty law) concrete, specific meaning commonly understood by those to whom it is addressed. It is important to note, however, that international human rights may also exhibit problems of adjudicative or interpretive indeterminacy and inherent conceptual contradictions similar to those which commentators have argued exist within the doctrinal law of any legal system. See, e.g., Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976). See generally Ken Kress, *Legal Indeterminacy*, 77 CAL. L. REV. 283 (1989). International legal scholars have recently begun to apply critiques similar to the claims of critical legal studies to the international legal system. See, e.g., Kennedy, *supra* note 18, at 28-39; MARTTI KOSKENIEMI, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT* (1989). See generally Phillip R. Trimble, *International Law, World Order, and Critical Legal Studies*, 42 STAN. L. REV. 811 (1990); Nigel Purvis, *Critical Legal Studies in Public International Law*, 32 HARV. INT'L L.J. 81 (1991).

56. The texts of some rights are more specific and provide significantly more guidance than others. See, e.g., CEDAW, *supra* note 50, arts. 11, 13; CPRC, *supra* note 47, art. 14(3). Some rights have also been partly clarified by the U.N. General Assembly's adoption of specific non-binding "guidelines" or "declarations." See, e.g., G.A. Res. 33, U.N. GAOR, 40th Sess., Supp. No. 53, at 206, U.N. Doc. A/40/53 (1986) (adopting Standard Minimum Rules for the Administration of Juvenile Justice: U.N. Doc. A/Conf.121/14 and Corr. 1); G.A. Res. 146, U.N. GAOR, 40th Sess., Supp. No. 53, at 254, U.N. Doc. A/40/53 (1986); *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, G.A. Res. 173, U.N. GAOR, 43d Sess., Supp. No. 49, at 297, U.N. Doc. A/43/49 (1989); *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, G.A. Res. 55, U.N. GAOR, 36th Sess., Supp. No. 51, at 171, U.N. Doc. A/36/51 (1982).

degree of abstraction and general language is perhaps necessary to any multilateral human rights treaty,⁵⁷ such language provides little textual guidance as to a right's specific content and meaning.⁵⁸ Experience has shown that formal State consensus over such broadly worded human rights standards tells us little about the depth of actual State agreement about such content.⁵⁹

This indeterminacy is reflected in those rights typically thought to be most important to democracy and international peace. For example, rights to participate in government,⁶⁰ freedom of expression and association,⁶¹ and self-determination⁶² are three sets of rights commonly

57. The use of general abstract language both allows needed interpretive flexibility and the vagueness necessary to accommodate cultural and political diversity. See Donoho, *supra* note 55, at 368-71. While the use of such language creates the conditions necessary for widespread agreement, it may also falsely indicate consensus over meaning. *Id.*; DAVID P. FORSYTHE, HUMAN RIGHTS AND WORLD POLITICS 39, 180 (1983); see also Abdullahi A. An-Na'im, *Conclusion to HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES* (Abdullahi A. An-Na'im ed., 1992) [hereinafter PERSPECTIVES]; THEODORE MERON, HUMAN RIGHTS LAW-MAKING IN THE UNITED NATIONS 126 (1986); FRANCK, LEGITIMACY, *supra* note 16, at 238; J.A. Andrews, *The European Jurisprudence of Human Rights*, 43 MD. L. REV. 463, 477-79 (1984); Forsythe, *supra* note 55, at 238.

58. See, e.g., Donoho, *supra* note 55, at 368-71, 378-86; Steiner, *supra* note 1, at 77, 85-86, 130; Koskeniemi, *supra* note 8, at 399-400, 405-06. See also FRANCK, LEGITIMACY, *supra* note 16, at 53-56.

59. See, e.g., WORLD CONFERENCE, *supra* note 3, at 10 (comments of Iran), 14 (Sweden); see also Donoho, *supra* note 55, at 368-71, 378-86; Steiner, *supra* note 1, at 80-93; Abduhalli A. An-Na'im, *Toward a Cross-Cultural Approach To Defining International Standards of Human Rights: The Meaning of Cruel, Inhuman, or Degrading Treatment or Punishment*, in PERSPECTIVES, *supra* note 57, at 19.

60. The right to political participation implicitly finds expression in numerous political and civil rights as well as economic and social rights. Cf. UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, COMMISSION ON HUMAN RIGHTS, QUESTION OF THE REALIZATION IN ALL COUNTRIES OF THE ECONOMIC, SOCIAL AND CULTURAL RIGHTS, AND STUDY OF SPECIAL PROBLEMS WHICH THE DEVELOPING COUNTRIES FACE IN THEIR EFFORTS TO ACHIEVE THESE HUMAN RIGHTS, INCLUDING: POPULAR PARTICIPATION IN ITS VARIOUS FORMS AS AN IMPORTANT FACTOR IN DEVELOPMENT AND IN THE FULL REALIZATION OF HUMAN RIGHTS; STUDY BY THE SECRETARY-GENERAL, at 6, 15-28, U.N. Doc. E/CN.4/1985/10 (1985). Its most widely adopted direct expression, however, is in article 21 of the Universal Declaration and article 25 of the CPRC. While neither of these provisions make explicit reference to democracy per se, both expressly require participation which will reflect the free expression of popular will. CPRC, *supra* note 47, art. 25(b); Universal Declaration, *supra* note 45, art. 21(3).

61. See CPRC, *supra* note 47, arts. 18-19, 21-22; Universal Declaration, *supra* note 45, arts. 18-20.

62. The right to self-determination is expressed in a multitude of international instruments, including articles 1(2) and 73 of the U.N. Charter and article 1 of both the CPRC and ESCRC. Prominent among the seemingly endless General Assembly resolutions referring to self-determination are the *Declaration on Principles of International Law Concerning Friendly Relations*, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 171, U.N. Doc. A/8028 (1971), and the *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States*, G.A. Res. 2131, U.N. GAOR, 20th Sess., Supp. No. 14, at 11, U.N. Doc. A/6014 (1966). See generally HANNUM, AUTONOMY, *supra* note 2, at 27-49.

thought fundamental to democracy.⁶³ Yet, each is sufficiently vague to permit a host of potentially contradictory interpretations. The right to participate in government, for example, explicitly requires universal suffrage, secret "genuine" elections, and the right to run for elected office.⁶⁴ Does it also require meaningful opportunities to petition the government, sponsor referenda, or seek recall of public officials? Are there institutional frameworks — such as the one-party States of Africa, the People's Republic of China's rule by Central Committee,⁶⁵ or Islamic theocracies⁶⁶ — which cannot satisfy the right? Is the right to "take part" in government meaningful when related rights such as education, participation in cultural life, a free and autonomous press, and freedom of association are not observed?⁶⁷

Does the right to "genuine," "periodic," and "secret" elections require multiparty, competitive election campaigns or some form of proportional representation as favored by liberal Western democracies?⁶⁸ Is districting or gerrymandering allowed? Are elections fair and genuine when economic forces, lack of education, and oppressive social structures

63. See, e.g., Franck, *Democratic Governance*, *supra* note 1, at 52, 75; Steiner, *supra* note 1, at 86–89; CSCE: Copenhagen, *supra* note 2, at 1307–12; Frank Przetacznik, *The Basic Collective Human Right to Self-Determination of Peoples and Nations As A Prerequisite for Peace*, 8 N.Y.L. SCH. J. HUM. RTS. 49, 50–68, 86–92, 104–05 (1990).

64. CPRC, *supra* note 47, art. 25; Universal Declaration, *supra* note 45, art. 21. When discussing what any particular human rights "text" may require, it is important to note that different States are in fact subject to different sources of human rights obligations. See *infra* text accompanying notes 102–12. Since these sources of obligation may contain different textual versions of the same rights, there may be no universal textual version of a particular right. *Id.*

65. See Donoho, *supra* note 55, at 384–85.

66. See *Democracy Denied in Algeria*, N.Y. TIMES, July 24, 1992, at A2; *A Prelude to Civil War?*, TIME, Jan. 27, 1992, at 30 (both describing the dilemma created for democracy by the Islamic fundamentalist movement in Algeria).

67. See, e.g., AGENDA FOR PEACE, *supra* note 6, ¶ 81; Steiner, *supra* note 1, at 108–13; Franck, *Democratic Governance*, *supra* note 1, at 75–76; Panel, *The Human Right to Participate in Government: Toward an Operational Definition*, *supra* note 2, at 508, 510, 515; HANNUM, AUTONOMY, *supra* note 2, at 112–15. Most commentators would agree that elections alone do not ensure either democracy or human rights. See, e.g., *id.* at 112–16; Tom J. Farer, *Elections, Democracy, and Human Rights*, 11 HUM. RTS. Q. 504, 509–11 (1989).

68. In the view of some, simple majoritarian politics may often trample on the interests of cultural or ethnic minority groups. See HANNUM, AUTONOMY, *supra* note 2, at 112–16. Nevertheless, the United Nations itself has begun to emphasize the majoritarian electoral process and election monitoring in recent years. See *Report on the Organization*, *supra* note 5, ¶ 96; G.A. Res. 130, U.N. GAOR, 46th Sess., Supp. No. 49 (1992); G.A. Res. 137, U.N. GAOR, 46th Sess., Supp. No. 49 (1992); *Human Rights Questions: Human Rights Questions, Including Alternative Approaches for Improving the Effective Enjoyment of Human Rights and Fundamental Freedoms; Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections; Report of the Secretary-General*, U.N. G.A., 47th Sess., Agenda Item 97(b), U.N. Doc. A/47/668 (1992), supplemented by U.N. Doc. A/47/668/Add.1 (1992); see also Franck, *Prospects*, *supra* note 1, at 634–38; Symposium, *Transitions to Democracy and the Rule of Law*, *supra* note 1, at 1070–73 (remarks of Amy Young).

conspire to dictate inevitable results?⁶⁹ Is public financing of political campaigns necessary to provide adequate opportunities for all to seek public office? These and other uncertainties about the meaning of this textually indeterminate right have been the source of continuing academic and political debate since the right's inception.⁷⁰ Indeed, academic literature and political history amply demonstrate that the concept of democracy is itself subject to myriad variations even when politically loaded adjectives such as "genuine" are stricken from the discourse.⁷¹

Diverse interpretations of rights are not only invited by the textual elasticity of such norms but also, in the case of association and expressive rights, by so-called "accommodation clauses." In this regard, the textually open rights to "freedom of expression" and "freedom of association" are subject to such restrictions as may be "necessary" to preserve "national security" or "public order, or public health or morals."⁷² In essence, these clauses invite the world's diverse States to limit rights in ways which those States themselves deem appropriate given their national circumstances. As might be expected, these indeterminate texts have given rise to diverse, controversial, and often contradictory interpretations throughout the world.⁷³

Similarly indeterminate are the rights of ethnic and cultural minorities⁷⁴ and the right to self-determination.⁷⁵ These two sets of rights,

69. See, e.g., Steiner, *supra* note 1, at 105; see also Symposium, *Transitions to Democracy and the Rule of Law*, *supra* note 1, at 1080-83 (remarks of Hurst Hannum) (arguing that neither elections nor democracy necessarily imply observation of human rights and that observation of human rights alone will not ensure social justice or development).

70. See Steiner, *supra* note 1, at 90-94, 96-129; see generally Panel, *The Human Right to Participate in Government: Toward an Operational Definition*, *supra* note 2.

71. See generally DAVID HELD, *MODELS OF DEMOCRACY* (1987).

72. E.g., CPRC, *supra* note 47, arts. 19, 22.

73. See Donoho, *supra* note 55, at 382-83; Steiner, *supra* note 1, at 83; MERON, *supra* note 57, at 114-15; Note, *Press Licensing Violates Freedom of Expression*, 55 U. CIN. L. REV. 891, 897-98, 919 (1987). But see Franck, *Democratic Governance*, *supra* note 1, at 61 (suggesting that speech rights have developed the necessary determinacy as interpreted by international organizations to support adoption of a right to democratic governance).

74. See HANNUM, *AUTONOMY*, *supra* note 2, at 63-70, 110-11; see also S. James Anaya, *The Capacity of International Law to Advance Ethnic or Nationality Rights Claims*, 75 IOWA L. REV. 837, 841-42 (1990).

75. Although referred to in numerous international agreements, see *supra* note 62; *infra* note 110, textual versions of the right to self-determination leave its meaning opaque. Thomas Franck, however, has argued that the right has been sufficiently explicated by international organizations to contain a reasonable core of concrete meaning and to support collective U.N. actions based upon democratic entitlement. See Franck, *Democratic Governance*, *supra* note 1, at 57-60; see also FRANCK, *LEGITIMACY*, *supra* note 16, at 153-74. Continuing academic and political debate about the right once it is extended beyond its traditional anticolonialist or "external" form indicates that this is an overly optimistic assertion. In contrast, Hurst Hannum, in a study of self-determination as it relates to the rights of cultural and ethnic minorities, found that there currently is no agreed upon definition of either self-determination or minority group rights in international or national law. HANNUM, *AUTONOMY*, *supra* note

which are fundamentally at issue in many of the major conflicts now plaguing the world,⁷⁶ generated controversy and political tension even before their emergence as conventional human rights law. Indeed, debate over their specific meaning and conflicts between them is inevitably involved in any modern discourse about democracy, human rights, and international peace.⁷⁷ Yet, despite their fundamental importance in international relations, and intense political and academic scrutiny, the rights remain ill-defined and controversial. Like many other textually indeterminate rights, the elasticity and indefiniteness of these norms have rendered them largely rhetorical political concepts rather than meaningful entitlements.⁷⁸

Some degree of indeterminacy is inherent to any system of legal rules. Indeed, most existing international human rights are no more textually indeterminate than similar "constitutive" norms found in domestic legal systems.⁷⁹ There are, however, a number of costs related to textually indeterminate human rights that are particularly problematic within the international system. First, the degree of potential variation and conflicting interpretations arising out of indeterminate international human rights norms is enormous. The international community is obviously a very diverse place with many variations on the major competing economic and political models.⁸⁰ The law itself, and human

2, at 27-30, 39, 41-49, 60-73; see Nafziger, *supra* note 12, at 15-20; Clark, *supra* note 14, at 24-31; see also HOWARD TOLLEY, JR., THE U.N. COMMISSION ON HUMAN RIGHTS, 143-44, 190-91 (1987); Nathaniel Berman, *Sovereignty in Abeyance: Self-Determination and International Law*, 7 WIS. INT'L L. J. 51, 52-60, 84-94 (1988); UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, COMMISSION ON HUMAN RIGHTS, SUB-COMMISSION ON PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES; PROTECTION OF MINORITIES, PRELIMINARY REPORT SUBMITTED BY MR. ASBJØRN EIDE, POSSIBLE WAYS AND MEANS OF FACILITATING THE PEACEFUL AND CONSTRUCTIVE SOLUTION OF PROBLEMS INVOLVING MINORITIES, U.N. Doc. E/CN.4/Sub.2/1991/43 (1991); UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, COMMISSION ON HUMAN RIGHTS, REPORT OF THE WORKING GROUP ON THE RIGHTS OF PERSONS BELONGING TO NATIONAL, ETHNIC, RELIGIOUS AND LINGUISTIC MINORITIES, U.N. Doc. E/CN.4/1991/53 (1991) (Draft Declaration).

76. See *Report on the Organization*, *supra* note 5, ¶ 90; AGENDA FOR PEACE, *supra* note 6, ¶¶ 17-19.

77. AGENDA FOR PEACE, *supra*, note 6, ¶¶ 17-19; see HANNUM, AUTONOMY, *supra* note 2, at 27-49; FRANCK, LEGITIMACY, *supra* note 16, at 160-65; Franck, *Democratic Governance*, *supra* note 1, at 57; Nafziger, *supra* note 12, at 17-20; Reisman, *supra* note 1, at 866-69; Przetacznik, *supra* note 63, at 49-50, 104-05.

78. Even more opaque and porous than civil and political rights are the whole set of economic, social, and cultural rights set forth in the ESCRC — rights which are often correctly seen as fundamental both to the observance of other human rights and ultimately to peaceful international relations. Rights to a decent standard of living, work, and property, for example, obviously mean something very different to government leaders in the People's Republic of China than they did to the Bush Administration. See Donoho, *supra* note 55, at 384-85.

79. See, e.g., MERON, *supra* note 57, at 2-3, 118.

80. See generally ADDA B. BOZEMAN, THE FUTURE OF LAW IN A MULTICULTURAL WORLD (1971); Masaji Chiba, *Cultural Universality and Particularity of Jurisprudence*, in

rights in particular, often mean different things to different people in different social and cultural contexts.⁸¹ The potential for conflicting variations in rights resulting from this diversity is compounded by the fact that it is the States themselves which originally interpret the meaning and content of international rules.⁸² This is particularly true in terms of conventional human rights law since most human rights treaties create at most "obligations of result" under which each State has the initial and primary responsibility for implementing the rights set forth in the treaty.⁸³

A second and perhaps primary cost of such indeterminacy is the degree to which it ultimately undermines the right's credibility. Experience has shown that States may have fully divergent understandings about the meaning of a right despite their agreement over the text of the norm.⁸⁴ In the case of genuine conflict over the meaning and specific content of a particular right, the existence of meaningful mutual State agreement and consent to be bound to that right may be questioned. As the world's diverse States continue to manifest unresolved and sometimes fundamentally contradictory views about what their various human rights obligations actually entail, doubt persists about the existence of meaningful, reciprocal obligations. Without firm expectations of reciprocal behavior, States are less likely to implement rights meaningfully, especially when doing so is contrary to their own perceived short term interests.⁸⁵ At the same time, significant textual indeterminacy allows recalcitrant States and egregious human rights violators the definitional flexibility to defend their practices through cynical interpretations of the norms. Violators of clearly defined, specific norms such as torture typically choose to deny the factual basis for alleged abuses.⁸⁶ For alleged violations of the more

ESSAYS ON THIRD WORLD PERSPECTIVES IN JURISPRUDENCE 303 (M.L. Marasinghe & William E. Conklin eds., 1984).

81. Adda B. Bozeman, *Law, Human Rights and Culture*, in *THE MORAL IMPERATIVES OF HUMAN RIGHTS: A WORLD SURVEY* 25, 26-29 (Kenneth W. Thompson ed., 1980); Chiba, *supra* note 80, at 306-11, 320-24.

82. See, e.g., Koskenniemi, *supra* note 8, at 399-404.

83. See generally Philip Alston & Gerard Quinn, *The Nature and Scope of State Parties' Obligations Under the International Covenant on Economic, Social and Cultural Rights*, 9 *HUM. RTS. Q.* 156, 164-77 (1987); Oscar Schachter, *The Obligation to Implement the Covenant in Domestic Law*, in *THE INTERNATIONAL BILL OF RIGHTS* 311 (Louis Henkin ed., 1981).

84. See Donoho, *supra* note 55, at 382-86. See also Koskenniemi, *supra* note 8, at 399, 404. This textual vagueness and elasticity allows the international community to "paper over" fundamental underlying conflicts over meaning. See FORSYTHE, *supra* note 57, at 39, 180; Louis Henkin, *Introduction*, in *THE INTERNATIONAL BILL OF RIGHTS*, *supra* note 83, at 9-11.

85. See *supra* notes 25-26 and accompanying text; Watson, *supra* note 23, at 618-19, 624-25; see also Steiner, *supra* note 1, at 80, 82.

86. See Steiner, *supra* note 1, at 80, 82; Memorandum for the United States as Amicus Curiae, *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), reprinted in 19 *I.L.M.* 585, 595 n.34 (1980).

abstract and elastic political, economic, and social rights, however, abusing States tend also to exploit textual indeterminacy to rationalize and justify their behavior based upon strained interpretations of their obligations.⁸⁷ Most significantly, such uncertainties over meaning tend to undermine allegations of abuse and make the potential for credible sanctions more remote. This, in turn, allows States to take their obligations less seriously. It also makes it more difficult for international monitors to clearly distinguish State rhetoric about alternative views of rights from legitimate claims about cultural and social diversity. Overly elastic human rights norms, therefore, not only cannot provide States with the critically important expectation of reciprocal, mutually conforming behavior, they also fail to provide a clear basis for finding and sanctioning violations.

These circumstances directly contribute to a third, related cost of textual indeterminacy: inconsistent interpretation and application of human rights standards to seemingly like cases by both the States themselves and by the U.N.'s political institutions. As noted above, States play a significant role in initially interpreting the meaning of rights through domestic implementation decisions.⁸⁸ They also add an interpretive gloss to rights when defending their own human rights record and in taking foreign policy actions relating to human rights in other nations. Such State-derived interpretations of rights are manifestly subject to political expediency as well as the influence of genuine diversity.⁸⁹ As a result, these State-endorsed interpretations of elastic, indeterminate human rights norms are often contradictory, inconsistent, and seemingly cynical.⁹⁰ Also subject to the vagaries of politics, the U.N. Commission on Human Rights (CHR), the central U.N. human rights

87. See Steiner, *supra* note 1, at 80, 86; Capotorti, *supra* note 52, at 992-95; Richard Falk, *Cultural Foundations for the Protection of Human Rights*, in PERSPECTIVES, *supra* note 57, at 44, 55.

88. There are good reasons to doubt whether State implementation decisions add significant content to international human rights since most States either cynically maintain that their existing domestic law already fully meets their international obligation, see Capotorti, *supra* note 52, at 996-97; *infra* notes 137, 169, or make liberal use of reservations to ensure that no changes in domestic law are required by adoption of the treaty. See, e.g., Letter from President Bush Urging Senate Advice and Consent to the CPRC, S. EXEC. REP. NO. 23, 102d Cong., 2d Sess. 25 (1992); see also Donoho, *supra* note 55, at 364 n.79; *Human Rights Commission Approves Principles to Protect Rights of Mentally Ill; Asks for Third Decade Against Racism*, U.N. CHRONICLE, June 1991, at 36, 38-39.

89. Human rights has proven a convenient banner for many States to further their international political interests as witnessed by debate over the occupied territories in the Middle East and the Reagan administration's cynical use of human rights to further its perceived interests vis-à-vis the former Soviet Union, Nicaragua, and El Salvador. See HUMAN RIGHTS WATCH, LAWYERS COMMITTEE FOR HUMAN RIGHTS, THE REAGAN ADMINISTRATION'S RECORD ON HUMAN RIGHTS IN 1988, at 1-8 (1989).

90. See, e.g., *id.*; Falk, *supra* note 87, at 55.

institution, has over the years produced highly politicized, inconsistent pronouncements about human rights situations worldwide.⁹¹ Such inconsistency was evidenced in 1992 by the CHR's condemnation of Cuba at the behest of the United States while lightly rebuking or failing to condemn even more egregious human rights violations in other parts of the world, most notably in China.⁹² A similar criticism can also be leveled against the U.N. General Assembly which, for example, has aggressively — and deservedly — condemned Israeli treatment of Palestinians while nearly ignoring gross human rights abuses elsewhere, including near genocide in East Timor and Uganda.⁹³ While such seemingly hypocritical decisions are clearly a function of political alliances, shifting priorities, and expedient blindness to apparent facts, the uncertain requirements of relevant human rights norms has also played a significant role in creating this unfortunate record. Such inconsistent treatment of human rights "situations" by the CHR and General Assembly, and manipulation of human rights by States in their international relations, also undermines the perceived legitimacy of the norms themselves.⁹⁴

Given the degree of textual indeterminacy present in the existing human rights normative framework and the pressures of vast cultural diversity, it seems clear that a great deal of normative development, in the form of interpretive elaboration of the meaning and specific content of rights, is a

91. See TOLLEY, *supra* note 75, at 29, 64, 70–71, 153–54, 188, 198–205; Penny Parker & David Weissbrodt, *Major Developments at the UN Commission on Human Rights in 1991*, 13 HUM. RTS. Q. 573, 575, 579, 584–85, 589, 593 (1991); see also Juliana G. Pilon, *The U.N. & Human Rights: The Double Standard*, Heritage Foundation Report, 1982, available in LEXIS, Nexis Library, Hfrpts File (although politically biased, this report provides an accurate factual review of the CHR's activities); JEANE J. KIRKPATRICK, *DICTATORSHIPS AND DOUBLE STANDARDS* (1982). Arguably, however, such inconsistencies primarily reflect the CHR's focus on fact-specific, general "situations" versus the meaning of specific rights as applied to individual cases. Indeed, the CHR is *designed* primarily as a political institution — a fact reflected in its shifting priorities and politically colored agenda. See TOLLEY, *supra* note 75, at 174, 180–204.

92. See, e.g., Carlos Batista, *Cuba: Diverse Reactions Over Human Rights Condemnation at U.N.*, Inter Press Service, Mar. 6, 1992, available in LEXIS, Nexis Library, Inpres File; Philippe Naughton, *Iraq Accused of "Massive" Human Rights Abuses*, Reuters News Reports, Mar. 5, 1992, available in LEXIS, Nexis Library, Reuter File.

93. See Bernard D. Nossiter, *U.N. Assembly, Rebuffing Soviet, Seats Cambodia Regime of Pol Pot*, N.Y. TIMES, Sept. 22, 1979, at A1; UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, COMMISSION ON HUMAN RIGHTS, QUESTION OF THE VIOLATION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS IN ANY PART OF THE WORLD WITH PARTICULAR REFERENCE TO COLONIAL AND OTHER DEPENDENT COUNTRIES AND TERRITORIES; STUDY OF THE HUMAN RIGHTS SITUATION IN EQUATORIAL GUINEA, U.N. Doc. E/CN.4/1371 (1980); Bazzyler, *supra* note 10, at 578 n.134, 595–96; Watson, *supra* note 23, at 611–12; Thomas M. Franck, *Of Gnats and Camels: Is There a Double Standard at the United Nations?* 78 AM. J. INT'L L. 811, 825 (1984).

94. See FRANCK, *LEGITIMACY*, *supra* note 16, at 142–49, 174. Consistent application is also a necessary attribute of effective decision-making institutions. See *id.*

priority if human rights are to fulfill their potential for enhancing international peace.

B. *The Problem of Unresolved Conflicts Between Rights*

The problem of indeterminacy among human rights norms significantly contributes to a second major normative weakness in the current system: unresolved actual and potential conflicts between human rights. Conflicts between rights are an inevitable result of any comprehensive system of legal norms which, like the international system, is derived from multiple, largely uncoordinated, nonhierarchical sources.⁹⁵ As noted by many commentators, a number of important conflicts already appear within the current international system.⁹⁶ Important examples of such conflict include the exercise of religious freedom versus non-discrimination provisions,⁹⁷ and the clash between group rights such as cultural integrity and many individual entitlements.⁹⁸ Perhaps more fundamental to the potential role of human rights in promoting peace is the ill-defined interface between still maturing minority group rights,⁹⁹ self-determination, and State sovereignty.¹⁰⁰ Indeed, as noted earlier, conflicting interpretations of these largely political concepts lie at the heart of many of the world's currently most volatile threats to peace.¹⁰¹ Many other

95. See *infra* text accompanying notes 102–12.

96. See, e.g., MERON, *supra* note 57, at 49–50, 78–79, 152–54; Panel, *Resolving Conflicting Human Rights Standards in International Law*, 85 AM. SOC'Y INT'L L. PROC. 336 (1991); *Report on Implementation*, *supra* note 15, ¶ 126.

97. See Abdullahi An-Na'im, *Religious Minorities under Islamic Law and the Limits of Cultural Relativism*, 9 HUM. RTS. Q. 1 (1987); Steiner, *supra* note 1, at 82–83; Panel, *Resolving Conflicting Human Rights Standards in International Law*, *supra* note 96, at 344–46 (comments of Donna J. Sullivan), 353 (comments of Tom Farer); MERON, *supra* note 57, at 154–60.

98. See, e.g., *Views of the Human Rights Committee under Article 5(4) of the Optional Protocol to the International Covenant on Civil and Political Rights Concerning Communication No. R.6/24*, U.N. GAOR 36th Sess., Supp. No. 40, at 166, U.N. Doc. A/36/40 (1981) (concerning Sandra Lovelace); *Views of the Human Rights Committee under Article 5, Paragraph 4 of the Optional Protocol to the International Covenant on Civil and Political Rights; Communication No. 197/1985, Kitok v. Sweden (Views adopted on 27 July 1988 at the thirty-third session)*, U.N. GAOR, 43d Sess., Supp. No. 40, at 221, U.N. Doc. A/43/40 (1988); see also HANNUM, *AUTONOMY*, *supra* note 2, at 63–69; Allan McChesney, *Aboriginal Communities, Aboriginal Rights, and the Human Rights System in Canada*, in PERSPECTIVES, *supra* note 57, at 221, 236–39; Diane Bell, *Considering Gender: Are Human Rights for Women Too? An Australian Case*, in PERSPECTIVES, *supra* note 57, at 339.

99. See TOLLEY, *supra* note 75, at 143–44; HANNUM, *AUTONOMY*, *supra* note 2, at 4–5, 63–72.

100. See generally HANNUM, *AUTONOMY*, *supra* note 2, at 4–10; Nafziger, *supra* note 12, at 9–21; see also Anaya, *supra* note 74, at 837–42; TOLLEY, *supra* note 75, at 190–91; AGENDA FOR PEACE, *supra* note 6, ¶¶ 17–18; Karen Reiersen & David Weissbrodt, *The Forty-Third Session of the U.N. Subcommittee on Prevention of Discrimination and Protection of Minorities*, 14 HUM. RTS. Q. 233, 251–54 (1992).

101. See *supra* notes 76–77.

potential conflicts among rights will manifest themselves as the process of implementing human rights matures. The high degree of indeterminacy which characterizes most international human rights standards provides ample room for such conflicts to arise and makes their resolution more difficult. An examination of these actual and potential conflicts (and priorities) among rights is beyond the scope of this article. Their continuing existence, however, reflects the immaturity of many important human rights norms.

C. The Problem of Nonuniformity and Incoherence in the Sources and Content of State Human Rights Obligations

A third major weakness of the human rights normative framework is its lack of uniformity or coherence in the sources and content of State obligations. The international human rights system is currently characterized by diffuse sources of State obligations. Human rights obligations for U.N. members, for example, may arise from any number of multilateral treaties created under U.N. auspices,¹⁰² obligations of a more inchoate nature may arise pursuant to Articles 55 and 56 of the Charter,¹⁰³ and a limited number of rights obligations are accepted as customary international law.¹⁰⁴ States may also be subject to human rights obligations outside the U.N. system through membership in regional organizations and treaties. While all U.N. members are subject to the Charter-based and customary international law obligations, such sources are limited in scope and controversial in content.¹⁰⁵ Membership in the various

102. See *supra* note 44; *Report on Implementation*, *supra* note 15, ¶ 15.

103. See generally Oscar Schachter, *The Charter and the Constitution: The Human Rights Provisions in American Law*, 4 VAND. L. REV. 643, 646-53 (1951).

104. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1987). Some authors argue (with inordinate optimism) that the entire Universal Declaration is now part of customary international law. See, e.g., John P. Humphrey, *The Universal Declaration of Human Rights: Its History, Impact and Juridical Character*, in HUMAN RIGHTS: THIRTY YEARS AFTER THE UNIVERSAL DECLARATION, 30-36 (B.G. Ramcharan ed., 1979). But see Watson, *supra* note 23, at 629-35; Pollis & Schwab, *supra* note 46, at 1-4.

105. The U.N.'s Commission on Human Rights and its Sub-Commission on Prevention of Discrimination and Protection of Minorities pay scant attention to the source of a State's human rights obligations, often considering matters for which the subject State has never expressly adopted or otherwise consented to an obligation. TOLLEY, *supra* note 75, at 109, 120, 124-32, 136. Arguably these institutions derive authority to consider such issues by virtue of Articles 55 and 56 of the U.N. Charter. It is commonly argued that the Universal Declaration supplies the content for these Articles. See, e.g., Humphrey, *supra* note 104, at 30-34; see also G.A. Res. 120, *supra* note 46, at 178; B.G. Ramcharan, *Substantive Law Applicable*, in INTERNATIONAL LAW AND FACT-FINDING IN THE FIELD OF HUMAN RIGHTS 26, 37-39 (B.G. Ramcharan ed., 1982). Nevertheless, few States would accept the argument that they are bound to the entire corpus of international human rights law simply by virtue of their Article 55 and 56 Charter obligations. Even if States accepted this position, however, it would not establish agreement on the content and meaning of the Universal Declaration's abstractly

multilateral treaty regimes remains far from universal and varies from treaty to treaty.¹⁰⁶ Even within the confines of each treaty, the content of each State's obligations often varies as the result of extensive reservations.¹⁰⁷ There is, therefore, no clearly unified body of human rights law binding on each member of the international community. Different States are in fact subject to different obligations.

This confusing state of affairs is compounded by the fact that these different sources of legal obligation often purport to declare and protect overlapping rights.¹⁰⁸ Thus, the rights to free speech and association, for example, are expressed in no less than nine major international instruments.¹⁰⁹ Similarly, the right to self-determination finds voice in a number of major treaties and a multitude of other international instruments,¹¹⁰ rights to political participation are expressed in at least nine major treaties,¹¹¹ and the concept of non-discrimination is virtually ubiquitous among the myriad sources of potential State obligations. This

stated norms. See Donoho, *supra* note 55, at 361, 369-72. Adding a layer of complexity to this ill-defined web of obligations, some treaties expressly obligate State Parties to respect the principles set forth in the Universal Declaration. See, e.g., CERD, *supra* note 49, arts. 4, 7.

106. See *supra* notes 44, 51.

107. Donoho, *supra* note 55, at 364 n.79.

108. See, e.g., *List of Articles Showing the Nature and Extent of Overlapping Under Six International Human Rights Instruments: Report of the Secretary-General*, U.N. Doc. E/C.12/1989/3 (1988).

109. See, e.g., CPRC, *supra* note 47, arts. 18-19, 21; CERD, *supra* note 49, art. 5(d) (see also art. 4 prohibiting certain speech); American Convention on Human Rights, *opened for signature* Nov. 22, 1969, arts. 12-13, O.A.S.T.S., No. 36, 9 I.L.M. 99; Banjul Charter on Human and Peoples' Rights, *opened for signature* June 27, 1981, arts. 8-11, 21 I.L.M. 58 (originally titled "African Charter on Human and Peoples' Rights") [hereinafter Banjul Charter]; Convention on the Rights of the Child, *opened for signature* Jan. 26, 1990, arts. 13-14, G.A. Res. 25, U.N. GAOR 44th Sess., Supp. No. 49, U.N. Doc. A/RES/44/25 (1989), 28 I.L.M. 1448; Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, arts. 9-11, 213 U.N.T.S. 221 (commonly known as the "European Convention"); see also CSCE: Copenhagen, *supra* note 2, ¶ 9.1; Universal Declaration, *supra* note 45, arts. 17-19; Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, G.A. Res. 55, U.N. GAOR, 36th Sess., Supp. No. 51, at 171, arts. 1, 6, U.N. Doc. A/36/51 (1982).

110. E.g., U.N. CHARTER pmbl.; CPRC, *supra* note 47, art. 1; ESCRC, *supra* note 48, art. 1; Banjul Charter, *supra* note 109, art. 20; Conference on Security and Co-operation in Europe: Final Act, Aug. 1, 1975, 14 I.L.M. 1292, pt. VIII, at 1295; see also *supra* note 62.

111. CPRC, *supra* note 47, art. 25; Convention on the Political Rights of Women, *opened for signature* Mar. 31, 1953, arts. I-III, 27 U.S.T. 1909, 193 U.N.T.S. 135; Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, March 20, 1952, art. 3, 213 U.N.T.S. 262; CERD, *supra* note 49, art. 5; CEDAW, *supra* note 50, art. 7; American Convention on Human Rights, *supra* note 109, art. 23; Banjul Charter, *supra* note 109, art. 13; see also Universal Declaration, *supra* note 45, art. 21; 1989 Convention Concerning Indigenous and Tribal People in Independent Countries, *opened for signature* June 27, 1989, art. 6, 28 I.L.M. 1382; Charter of Paris for a New Europe, Nov. 21, 1990, 30 I.L.M. 190; Conference on Security and Co-operation in Europe: Report to the CSCE Council From CSCE Seminar of Experts on Democratic Institutions, Nov. 15, 1991, 31 I.L.M. 375; *supra* note 60.

array of overlapping rights obligations creates a great potential for confusion, contradiction, overextension of resources, and conflicting interpretations of the same or related rights.¹¹² Moreover, the lack of coherence and uniformity in States' human rights obligations directly exacerbates the problems of indeterminacy and unresolved conflicts between rights described above. In turn, each of these problems serves to undermine the effectiveness of the normative framework.

III. AN EVALUATION OF THE U.N.'S HUMAN RIGHTS DECISION-MAKING AND INTERPRETIVE CAPACITY

Each of the normative weaknesses described above has direct implications for the future role of human rights in enhancing international peace as well as for United Nations' efforts to implement, monitor, and enforce human rights obligations. Significantly, most of these weaknesses are also common in some degree to any comprehensive set of rules governing social behavior. Yet many domestic legal systems manage, more or less successfully, to deal with such problems and command a strong degree of compliance and perceived legitimacy.¹¹³

Explanations for the success of domestic legal systems in this regard may vary, but most would agree that a well-developed process of decision-making through which legal norms are interpreted and applied in accordance with generally accepted procedures is critical.¹¹⁴ Of course, many important characteristics distinguish the international legal system from a municipal one in this regard.¹¹⁵ Yet the international system's

112. The system is correspondingly characterized by an array of overlapping monitoring responsibilities. See *infra* text accompanying notes 132-37. See generally Theodore Meron, *Norm Making and Supervision in International Human Rights: Reflections on Institutional Order*, 76 AM. J. INT'L L. 754 (1982); *Report on Implementation*, *supra* note 15.

113. Many legal theorists have attempted to explain citizen compliance with law as, at least partly, a function of the *perceived* legitimacy of legal institutions, decision-making processes, and norms. See generally Hyde, *supra* note 30. In a thoughtful article summarizing and critiquing these theories, Alan Hyde argues that traditional concepts of legitimacy lack empirical support and that the influence of perceived legitimacy upon behavior is weak at best. *Id.* at 408-26. Hyde argues instead that obedience or not to law can best be explained on the basis of rational decision-making about the content of the law, self-interest, and fear of sanction by those affected. *Id.* Franck and other process-oriented international lawyers tend to deemphasize such factors and reject moral content as a criterion for international institutional and normative legitimacy. See FRANCK, *LEGITIMACY*, *supra* note 16, at 21-26, 31-39, 64, 235-36; Schachter, *supra* note 27, at 304-12, 317-21.

114. See, e.g., HART, *supra* note 16, at 75-96, 102, 109-13, 121-44; DWORKIN, *supra* note 16, at 211-14, 255-75; see also FRANCK, *LEGITIMACY*, *supra* note 16, at 15-19; Hyde, *supra* note 30, at 400-07 (summarizing and critiquing uses of process-oriented concepts of legitimacy).

115. In the international arena, for example, the difficult implications of indeterminacy, diversity, and conflicting priorities are far more pronounced than in any existing domestic polity. See Donoho, *supra* note 55, at 348-55. Nor is there a reliable, certain source of coercive power in the form of a sovereign through which to enforce the legal system's

capacity to cure the problems of indeterminacy, conflicting standards, overlapping obligations, and profound diversity — as well as improve the general effectiveness of its rules — depends equally on the quality and credibility of its interpretation and decision-making processes. Thus, as explained in Part I, the United Nations must provide a generally accepted process of authoritatively interpreting rights and rendering credible decisions regarding their application if human rights are to play a positive role in maintaining international peace and security.¹¹⁶

As described below, however, the U.N. system exhibits some of its most critical weaknesses here at the level of institutional decision-making. This is particularly true of its capacity to develop clear, specific standards through authoritative interpretation, application, and monitoring of rights and to render credible, fair enforcement and sanctioning decisions. It is concerning this process that U.N. reformers should focus their greatest efforts if international human rights considerations are to figure positively in issues of international peace and security.

A. *Characteristics of Effective International Decision-making Institutions*

Many analysts of international and municipal legal systems have described the crucial contribution of a legitimized, credible decision-making process to a legal system's effectiveness.¹¹⁷ This work suggests that the normative weaknesses described above could be at least partially alleviated by a strong institutional decision-making process which credibly provides specific content to rights, resolves conflicting interpretations, and fairly evaluates alleged violations.¹¹⁸ Such a process is also critical to proposals for making human rights considerations an important

decisions.

116. See *supra* text accompanying notes 16–43.

117. See *supra* notes 18, 34 and accompanying text; see, e.g., FRANCK, LEGITIMACY, *supra* note 16, at 61–64, 83–88, 193–99; Franck, *Prospects*, *supra* note 1, at 626–28; MERON, *supra* note 57, at 2–3, 118, 134–35, 175, 269–71; FORSYTHE, *supra* note 55, at 39–40; Reisman, *supra* note 1, at 875; Andrews, *supra* note 57, at 473, 477–78; see also HART, *supra* note 16, at 208–31; Koskeniemi, *supra* note 8, at 399–400, 402–07; Ian Johnstone, *Treaty Interpretation: The Authority of Interpretive Communities*, 12 MICH. J. INT'L L. 371 (1991); Jack Donnelly, *International Human Rights: Regime Analysis*, 40 INT'L ORG. 599 (1986).

118. It is important to recognize that it may be appropriate or even necessary, for reasons of policy, credibility, or efficiency, to allocate different decision-making tasks — such as fact-finding, interpretation, conflict resolution, and sanctioning violations — to different institutions. Thus, the Security Council and General Assembly are probably not appropriate institutions to conduct basic fact-finding or render legal interpretations of human rights, and independent bodies of experts are probably neither appropriate nor effective for ordering sanctions for human rights violations. Such divisions of authority present complex institutional issues which are beyond the scope of this article, but on their face they seem to demand significant restructuring of the U.N. system. See *supra* note 43.

element of collective security decisions at the United Nations. Among those characteristics of effective decision-making institutions most often cited, six appear particularly important in evaluating the potential role of international human rights and human rights institutions in promoting world peace.

First, the decision-making and interpretive process must be perceived as credible and authoritative to those to whom its decisions are directed.¹¹⁹ This requires that the relevant institutions have recognized competence and clearly defined and accepted mandates for the tasks assigned to them.¹²⁰ It also requires that the process produce decisions that are authoritative within the overall rule system or at least clearly located within a hierarchy of authority.¹²¹ A strong, authoritative interpretation process, which is perceived as legitimate by States, is particularly critical if human rights norms are to be used as a basis for collective action in a reformed United Nations. Such a process is necessary to give indeterminate, elastic human rights a specific content which unambiguously communicates the State's obligation and by which State behavior may be fairly judged for legitimate enforcement activities.¹²²

Second, this decision-making process must have fair, well-developed mechanisms for hearing and resolving disputes presented through agreed upon, credible procedures.¹²³ Particularly when interpreting rights, the opportunity to resolve concrete disputes is important. These mechanisms must be capable of fairly presenting all information necessary to the decision and providing adequate opportunities for those affected to be heard.¹²⁴ The perception that decisions and interpretations are only made

119. See, e.g., FRANCK, *LEGITIMACY*, *supra* note 16, at 61–64; Schachter, *supra* note 27, at 307–12; Reisman, *supra* note 1, at 875–76; Johnstone, *supra* note 117, at 374–76.

120. See, e.g., Schachter, *supra* note 27, at 308–13. The criterion of institutional competence cannot be separated from the expertise — and impartiality — of the decision-makers themselves. Many commentators have raised serious questions about both the competence of individuals serving on international human rights monitoring bodies and the politicized nature of their deliberations. See MERON, *supra* note 57, at 276; Panel, *Reforming United Nations Human Rights Lawmaking*, 80 AM. SOC'Y INT'L L. PROC. 175, 176 (1986) (remarks of Theodore Meron); Reed Brody et al., *Major Developments in 1990 at the UN Commission on Human Rights*, 12 HUM. RTS. Q. 559, 587 (1990).

121. See, e.g., HART, *supra* note 16, at 208–31; MERON, *supra* note 57, at 173, 183, 200–02, 262–64; *Report on Implementation*, *supra* note 15, ¶¶ 127–28; Meron, *supra* note 44, at 754–61.

122. See *supra* text accompanying notes 79–94.

123. See, e.g., Anderson, *supra* note 8, at 26–27; Franck, *Prospects*, *supra* note 1, at 616; Schachter, *supra* note 27, at 310.

124. See Thomas M. Franck & H. Scott Fairley, *Procedural Due Process in Human Rights Fact-Finding by International Agencies*, 74 AM. J. INT'L L. 308 (1980); Nicolas Valticos, *Foreword to INTERNATIONAL LAW AND FACT-FINDING IN THE FIELD OF HUMAN RIGHTS*, at VII, VIII–X; B.G. Ramcharan, *Introduction to INTERNATIONAL LAW AND FACT-FINDING IN THE FIELD OF HUMAN RIGHTS*, *supra* note 105, at 1–2; see also G.A. Res. 176, U.N. GAOR,

with complete information to which all concerned parties have fairly contributed greatly enhances the credibility of an institution's decisions.

Third, this process must have well-developed, generally accepted rules about decision-making — whether the task involved is supervision, interpretation, evaluation of violations, or ordering remedial action such as sanctions.¹²⁵ In essence, the decision-making process and its institutions must be governed by a minimal level of agreed upon jurisprudence regarding how decisions are reached. It is critical in this regard that U.N. institutions develop and adhere to a sound jurisprudence regarding the delicate process of interpreting human rights in the context of diversity¹²⁶ and for fairly resolving factual disputes critical to applying such interpretations.¹²⁷

Fourth, the relevant institutions must prove themselves credible through coherent and consistent applications of the rights they monitor.¹²⁸ In order to achieve a semblance of consistency and coherence among human rights, it is vital to have a central, authoritative voice to give uniform content and meaning to the rights promoted. Similarly, the decisionmakers should — at least when fact-finding, and interpreting or monitoring rights — be allowed a significant degree of independence and recognized political neutrality.

Fifth, and perhaps most importantly for human rights, the international decision-making process must develop rational doctrines which accommodate the diverse cultural, social, and economic circumstances of those affected by its decisions while nevertheless generating a uniform, coherent body of law. In essence, decisions about the substance of rights, in their specific requirements and interpreted meaning, must be perceived

35th Sess., Supp. No. 48, at 197 (1981); E.S.C. Res. 1870, U.N. ESCOR, 56th Sess., Supp. No. 1, at 23, U.N. Doc. E/5544 (1974).

125. See, e.g., HART, *supra* note 16, at 77–150; FRANCK, LEGITIMACY, *supra* note 16, at 61–64, 87–88, 181–84; MERON, *supra* note 57, at 134–35. See also Donnelly, *supra* note 117, at 603–08; Johnstone, *supra* note 117, at 372, 374–78, 380–86 (discussing the concept of “interpretive community” as a constraint on State interpretation of treaty obligations); *supra* note 42 and text accompanying notes 18–23.

126. See Donoho, *supra* note 55, at 386–91; Panel, *Resolving Conflicting Human rights Standards in International Law*, *supra* note 96, at 341.

127. See Franck & Fairley, *supra* note 124; Richard B. Lillich, *Preface to FACT-FINDING BEFORE INTERNATIONAL TRIBUNALS*, at VII (Richard B. Lillich ed., 1991); see also Johnstone, *supra* note 117, at 419; Ved P. Nanda, *The United States Armed Intervention in Grenada — Impact on World Order*, 14 CAL. W. INT'L L.J. 395, 408–09 (1984); Theo van Boven, *The Role of the U.N. Secretariat in the Area of Human Rights*, 24 N.Y.U. J. INT'L L. & POL. 69, 83 (1991); *Declaration on Fact-Finding by the United Nations in the Field of the Maintenance of International Peace and Security*, G.A. Res. 59, U.N. GAOR, 46th Sess., Supp. No. 49, at 290, U.N. Doc. A/46/59 (1991). On international fact-finding generally see FACT-FINDING BEFORE INTERNATIONAL TRIBUNALS, *supra*; INTERNATIONAL LAW AND FACT-FINDING IN THE FIELD OF HUMAN RIGHTS, *supra* note 105.

128. See, e.g., FRANCK, LEGITIMACY, *supra* note 16, at 138–48, 180.

as culturally and socially appropriate by the world's diverse States and the people whose interests they hopefully represent.¹²⁹

Sixth, and finally, these institutions should have some means of carrying out their decisions — that is, inducing compliance through measures, coercive or otherwise — which appeal to the States' self-interest by creating the expectation of some detriment from non-compliance.¹³⁰ Indeed, implicit to many of the reform proposals described above is the assumption that the coercive authority of the Security Council should be directed toward improving compliance with human rights norms.¹³¹

The more that international human rights interpretive and decision-making processes exhibit the six characteristics described above, the more likely it is that States will comply with their obligations and respect human rights justifications for collective security actions. Unfortunately, even a brief overview of the relevant processes of the U.N. system reveals serious weaknesses in each of these six characteristics.

B. *Human Rights Decision-making Within the U.N. System*

Many U.N.-affiliated institutions have human rights decision-making, fact-finding, and interpretive responsibility.¹³² Primary among these are the Charter-based Commission on Human Rights and its subsidiary bodies, and the multilateral treaty institutions associated with the United

129. This requires, among other things, the development of interpretive doctrines which strike a fair balance between State discretion, group and individual interests, and international supervision. It is only through such a process that the international community can develop specific, meaningful human rights standards while at the same time allowing sufficient variations in their content to accommodate diversity and render them culturally sensitive. See Donoho, *supra* note 55, at 377–78, 386–91; An-Na'im, *supra* note 59, at 19–29; Richard Falk, *Cultural Foundations for the International Protection of Human Rights*, in PERSPECTIVES, *supra* note 57, at 44–46. But see Rhoda E. Howard, *Dignity, Community and Human Rights*, in PERSPECTIVES, *supra* note 57, at 81–82, 90–99.

130. See, e.g., Schachter, *supra* note 27, at 310; Watson, *supra* note 23, at 618–19. This power of coercion need not be absolute and could come in many forms, including withdrawal of a State's international "entitlements" associated with membership in the international community. See *supra* text accompanying notes 25–26. It is interesting that Thomas Franck, the leading proponent of the power of "legitimacy" in inducing State compliance with international law, also recognizes the significance of meaningful sanctions. See Franck, *Prospects*, *supra* note 1, at 626–30.

131. See *supra* text accompanying notes 8–15.

132. I have assumed throughout this article that the Security Council would have ultimate responsibility for deciding to take enforcement actions against States whose human rights violations threaten international peace. It should also be noted that the U.N. General Assembly (and its third committee), the Secretary-General (and Secretariat), the Economic and Social Council, specialized agencies, and the Security Council could all play important roles in human rights interpretation and fact-finding. However, their roles in the critical interpretation and fact-finding processes are currently underdeveloped and less central than that of the human rights institutions. While important to the issues discussed here, I have for these reasons and space limitations omitted direct discussion of their potential roles.

Nations.¹³³ One of the most significant characteristics of both these kinds of entities is that they function primarily — although not exclusively — through monitoring and supervision.¹³⁴ Regardless of the source of obligation, but particularly in the case of multilateral treaty regimes, the initial task of norm interpretation is left to the State Parties themselves.¹³⁵ The primary role given to international institutions in this context is to monitor the various States' initially discretionary decisions regarding implementation of the rights.¹³⁶ Thus, States have reserved for themselves a great deal of the interpretive authority relating to human rights and play a critical role in the interpretation process.¹³⁷

1. Charter-based Monitoring Bodies

The primary institution concerned with human rights supervision at the United Nations is the CHR.¹³⁸ The CHR, which reports to the General Assembly through the Economic and Social Council (ECOSOC), is primarily a policy-making, political body consisting of fifty-three governmental representatives who are assigned general responsibility for overseeing human rights activities within the United Nations and promoting "effective enjoyment" of human rights.¹³⁹ The CHR's agenda

133. The most important of these multilateral treaty institutions are the CPRC's Human Rights Committee (HRC) and committees of experts created to monitor the ESCRC (ESCR Committee), CERD (CERD Committee), and CEDAW (CEDAW Committee). Other multilateral treaty institutions include those created under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1985, art. 1, S. TREATY DOC. NO. 20, 100th Cong., 2d Sess. (1988), G.A. Res. 46, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/RES/39/46 [hereinafter CAT] and the Convention on the Rights of the Child, *supra* note 109, art. 43.

134. Bilder, *supra* note 44; Symposium, *Transitions to Democracy and the Rule of Law*, *supra* note 1, at 1049–50 (remarks of Diane Orentlicher).

135. The CPRC, for example, obligates each State Party to "take the necessary steps . . . to adopt such legislative or other measures as may be necessary to give effect to the rights recognized." CPRC, *supra* note 47, art. 2(2). The ESCRC is even more accommodating of State discretion, requiring only that each State "undertakes to take steps . . . to the maximum of its available resources, with a view to achieving progressively the full realization of rights." ESCRC, *supra* note 48, art. 2(1); *see also* Donnelly, *supra* note 117, at 608; Anderson, *supra* note 8, at 21–24; Capotorti, *supra* note 52, at 977–78; Koskeniemi, *supra* note 8, at 406.

136. *E.g.*, Donnelly, *supra* note 117, at 608, 617.

137. This systemic feature of international treaty law has invariably led States to interpret their international human rights obligations to require no more than what their existing domestic law already provides. *See* Capotorti, *supra* note 52, at 996–97; *infra* note 171; *see also* Donoho, *supra* note 55, at 375; Johnstone, *supra* note 117, at 372 (States are predisposed to interpret treaties to maximize their perceived self-interest); Koskeniemi, *supra* note 8, at 406. Thus, since most States appear to give lip service to implementation, the idea that States interpret rights by giving them specific content through implementation is probably illusory. This hollow legal formalism is exacerbated domestically as many States fail to scrupulously follow their own legal system.

138. *See* TOLLEY, *supra* note 75, at 215.

139. ECOSOC has expressly authorized the CHR to assist it in coordinating U.N. human

consists primarily of public deliberations concerning "situations" involving consistent patterns of "gross" human rights violations pursuant to ECOSOC Resolution 1235,¹⁴⁰ confidential procedures concerning such situations under ECOSOC Resolution 1503,¹⁴¹ promotional activities and development of new human rights standards for ECOSOC and General Assembly approval,¹⁴² and supervision over the activities of its numerous subsidiary organs.¹⁴³

Credible findings, under well-defined standards, regarding "situations" of "gross" human rights abuses which threaten peace, could ultimately be a sound first step to Security Council action based upon human rights considerations.¹⁴⁴ The CHR, as presently constituted, is ill-suited to reaching such credible findings. Although its pronouncements are, in principle, almost entirely fact-dependent, the CHR's investigative methods are weak and underdeveloped.¹⁴⁵ More importantly, by its very nature,

rights activities. E.S.C. Res. 36, U.N. ESCOR, 1979 Sess., Supp. No. 1, at 26, U.N. Doc. E/1979/79 (1979). This resolution also implicitly ties the 1966 Covenants and the Universal Declaration to Articles 55 and 56 of the Charter and instructs the CHR to use those instruments to guide its efforts "for improving the effective enjoyment of human rights." *Id.* ¶¶ 2, 16. In theory, the 70 or so States which have not become Parties to the 1966 Covenants, see *supra* note 51, are not bound to their provisions. However, in practice the CHR has shown little concern over legal niceties such as the source and nature of States' human rights obligations. See TOLLEY, *supra* note 75, at 109, 120, 124-32, 210; *supra* note 105.

140. E.S.C. Res. 1235, U.N. ESCOR, 42d Sess., Supp. No. 1, at 17, U.N. Doc. E/4393 (1967).

141. E.S.C. Res. 1503, U.N. ESCOR, 48th Sess., Supp. No. 1A, at 8, U.N. Doc. E/4832/Add.1 (1970).

142. ECOSOC and General Assembly resolutions authorize the CHR to, among other things: (1) submit reports, proposals, and recommendations to ECOSOC (including creation of human rights instruments); (2) conduct studies for ECOSOC or any other U.N.-related human rights institution; (3) assist ECOSOC in coordinating human rights activities; (4) take steps to promote and encourage human rights and improve their effective enjoyment. See E.S.C. Res. 5, U.N. ESCOR, 1st Sess., Supp. for Jan. 23-Feb. 18, 1946, at 163, U.N. Doc. [E/PV.1-14] (1946); E.S.C. Res. 9, U.N. ESCOR, 2d Sess., Supp. for May 25-June 21, 1946, at 400, U.N. Doc. [E/PV.1-15] (1946); E.S.C. Res. 1979/36, *supra* note 139, ¶ 16.

143. The CHR currently supervises the work of, among others, special working groups and rapporteurs on disappearances, executions, torture, religious intolerance, mercenaries, arbitrary detentions, and children. See Parker & Weissbrodt, *supra* note 91, at 573, 593-604. The CHR also directly supervises the activities of its Sub-Commission on Prevention of Discrimination and Protection of Minorities and its equally numerous working groups and rapporteurs. See *id.* at 604-08; *infra* text accompanying notes 150-53.

144. See *supra* note 43. Finding a "breach" or "threat to peace" is the Charter's prerequisite for collective security actions by the Security Council. See U.N. CHARTER arts. 39, 41-42. Nevertheless, the United Nations has never developed clearly defined legal criteria specifying what a threat to or breach of peace entails, relying instead upon vague political criteria. See Paul C. Szasz, *Role of the United Nations in International Conflicts*, 13 GA. J. INT'L & COMP. L. 345, 347-51 (1983).

145. See TOLLEY, *supra* note 75, at 64-66, 71-74, 119, 130; see also Franck & Fairley, *supra* note 124, at 312-23; van Boven, *supra* note 5, at 96-98. The CHR's focus on "situations" may ameliorate these weaknesses somewhat by compelling CHR scrutiny only where overwhelming numbers of complaints establishing a "pattern" of abuse make overall factual error unlikely. This does not change the critical fact, however, that political

CHR decision-making is overtly political rather than quasi-judicial or administrative. Thus, its decisions regarding human rights result from considerations of State self-interest and geopolitics, rather than impartial fact-finding and application of standards. Indeed, many would argue that the CHR's public debates of human rights "situations" have proven primarily to be a forum for political rhetoric and State maneuvering.¹⁴⁶

The CHR has no express mandate to "apply" or interpret the meaning and specific content of rights,¹⁴⁷ although its general promotional and supervisory duties imply some such capacity. Nor do the CHR's primary activities easily lend themselves to the task of generating authoritative interpretations of rights. By their very nature, confidential deliberations under Resolution 1503 preclude publicly visible interpretive work which could enhance the authoritativeness of interpretations of specific human rights standards. Since public debate pursuant to Resolution 1235 is limited to consideration of "situations" involving a "consistent pattern" of "gross" human rights abuses,¹⁴⁸ this primary CHR activity almost never focuses on the content or meaning of any particular right. Moreover, the CHR has shown no inclination in this context to render interpretations. Rather, deliberations proceed without the CHR as a body ever specifically defining the specific requirements or meaning of the rights being addressed. The result has been that any limited interpretive gloss such debates might have regarding U.N. members' human rights obligations is essentially lost through vagueness and notoriously inconsistent, politically influenced pronouncements.¹⁴⁹

The most important subsidiary body of the CHR is the Sub-Commission on Prevention of Discrimination and Protection of Minorities.¹⁵⁰ The

considerations rather than facts determine the CHR's reactions to human rights situations around the world. See sources cited *infra* note 146.

146. See TOLLEY, *supra* note 75, at 29, 70-71, 153-54, 174, 198-205; Reed Brody et al., *The 42nd Session of the Sub-Commission on Prevention of Discrimination and Protection of Minorities*, 13 HUM. RTS. Q. 260, 263 n.8 (1991) ("Votes on country resolutions in the Commission are more likely to reflect relations with a particular country than the human rights situation . . ."); see also Eric Lane, *Mass Killing by Governments: Lawful in the World Legal Order?*, 12 N.Y.U. J. INT'L L. & POL. 239, 273 (1979) ("a deception creating an illusion of concern and activity"); Parker & Weissbrodt, *supra* note 91, at 579-60, 584-85, 589; Brody et al., *supra* note 120, at 559, 587 (growing north-south divisions highly politicizing the CHR's work); Torkel Opsahl, *Instruments of Implementation of Human Rights*, 10 HUM. RTS. L.J. 13, 26-27 (1989).

147. In the early years of the United Nations, ECOSOC approved the CHR's self-imposed incapacity to consider individual complaints of human rights violations. See E.S.C. Res. 728, U.N. ESCOR, 28th Sess., Supp. No. 1, at 18, 19, U.N. Doc. E/3290 (1959).

148. E.S.C. Res. 1235, *supra* note 140, ¶¶ 2, 3.

149. None of this should be surprising, of course, given that the CHR is an overtly political policy body composed of government representatives rather than independent experts. See TOLLEY, *supra* note 75, at 204; Donnelly, *supra* note 117, at 612.

150. See generally TOLLEY, *supra* note 75, at 154-97; Reiersen & Weissbrodt, *supra* note

Sub-Commission, unlike the CHR, is comprised of twenty-six experts who, at least formally, work independently of State affiliations. The Sub-Commission's primary functions, parallel to those of the CHR, include the consideration and screening of "situations" involving a "consistent pattern of violations of human rights," pursuant to Resolutions 1503 and 1235, and the preparation of expert studies.¹⁵¹ In this regard, the Sub-Commission supervises and directs the activities of many rapporteurs and working groups concerned with studying human rights or investigating violations.¹⁵² Although the Sub-Commission's decisions regarding (potentially peace threatening) situations of gross human rights violations under Resolutions 1503 and 1235 appear to be more impartial and credible than the CHR's, it has virtually no binding legal authority and a very limited mandate. Moreover, its work is hardly free from politicization and is increasingly subject to the restrictive supervision of the CHR.¹⁵³ Similarly, although the Sub-Commission has done some significant work on developing the content of existing standards through the preparation of expert academic studies and drafting declarations and guidelines regarding specific rights, it has neither the capacity nor legal mandate to impose such interpretations on States.¹⁵⁴

100; Brody et al., *supra* note 146; Robin M. Maher & David Weissbrodt, *The 41st Session of The UN Sub-Commission on Prevention of Discrimination and Protection of Minorities*, 12 HUM. RTS. Q. 290 (1990).

151. E.S.C. Res. 1235, *supra* note 140, ¶¶ 2, 3.

152. See TOLLEY, *supra* note 75, at 172-79; Maher & Weissbrodt, *supra* note 150, at 309-26; Reiersen & Weissbrodt, *supra* note 100, at 247-70.

153. The Sub-Commission, whose members are essentially selected by the governmental representatives serving on the CHR, always has been the subject of serious complaints about politicization. See, e.g., TOLLEY, *supra* note 75, at 71, 74-76, 125, 180; John P. Humphrey, *The United Nations Sub-Commission on the Prevention of Discrimination and the Protection of Minorities*, 62 AM. J. INT'L L. 869, 869-70 (1968); Panel, *Reforming United Nations Human Rights Lawmaking*, *supra* note 120, at 176 (remarks of Theodore Meron); Brody et al., *supra* note 146, at 261-63, 289. In 1989, in order to lessen political pressures, the Sub-Commission adopted new procedures involving secret voting; however, their work continues to be affected by governmental and regional block pressures. See Maher & Weissbrodt, *supra* note 150, at 291, 297-301, 305-08; Brody et al., *supra* note 146, at 272, 274, 289-90. The Commission, while approving secret votes when a majority of the Sub-Commission so decides, see Parker & Weissbrodt, *supra* note 91, at 605-06, has itself mounted increasing political pressure against the Sub-Commission by becoming progressively more critical of the Sub-Commission's independent work. See *id.* at 604-08; Reiersen & Weissbrodt, *supra* note 100, at 247-57; Brody et al., *supra* note 146, at 261-63 ("the real motive for curbing Sub-Commission involvement ... [may be] to eliminate one forum where country specific violations are discussed").

154. See TOLLEY, *supra* note 75, at 134-46; Reiersen & Weissbrodt, *supra* note 100, at 247-57; Brody et al., *supra* note 146, at 275-89. The Sub-Commission's interpretations of norms have also been weakened by compromises forced through consensus voting and political maneuvering. *Id.*; see also Dona D. Fischer, Note, *Reporting Under the Covenant on Civil and Political Rights: The First Five Years of the Human Rights Committee*, 76 AM. J. INT'L L. 142, 149-51 (1982) (discussing the problems and strengths of consensus voting at the HRC); DOMINIC MCGOLDRICK, THE HUMAN RIGHTS COMMITTEE ¶ 3.38 (1990). The work of Sub-

2. Multilateral Treaty Monitoring Bodies

Although there are some differences among the decision-making, fact-finding, and interpretive processes available under the various major human rights treaties, each follows the same general pattern. Typically, the treaty creates a committee of independent experts with four primary functions: (1) review of State Parties' periodic reports on progress in implementing rights; (2) issuance of "general comments" or "recommendations" regarding those reports; and, for States which expressly consent, (3) mediation of interstate complaints; and (4) consideration of individual petitions.¹⁵⁵ At least in principle, each of these committee functions offers some opportunities for establishing the factual predicates for human rights-based collective security decisions and for rendering interpretations of the rights contained in the treaties. The extent to which these opportunities are meaningfully exploited in practice, however, is largely a function of how each particular institution — and the State Parties — have construed its mandate and function. In this regard, a review of the work of the Civil and Political Rights Covenant's¹⁵⁶ (CPRC) Human Rights Committee (HRC) is typical and instructive.

Like other treaty-based expert committees, the United Nations designed the HRC¹⁵⁷ primarily to assist States in promoting human rights rather than as a true, quasi-judicial fact-finder and watchdog over State behavior.¹⁵⁸ The HRC has also construed its mandate narrowly. HRC

Commission experts, while useful, clearly lacks authoritative legal status. See, e.g., Symposium, *Transitions to Democracy and the Rule of Law*, *supra* note 1, at 1054 (remarks of Diane Orentlicher) (with General Assembly endorsement such work may become suggestive).

155. See, e.g., CPRC, *supra* note 47, arts. 40–42; Optional Protocol to the International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171, 302–46 [hereinafter CPRC Optional Protocol]; CERD, *supra* note 49, arts. 9, 11–12, 14; CEDAW, *supra* note 50, arts. 18–21; CAT, *supra* note 133, arts. 19, 21–22. Neither CEDAW nor ESCRC have provisions for either interstate or individual complaints. (Note, however, that CEDAW article 29 provides for referral of interstate disputes to arbitration or the International Court of Justice.) Nor, until 1985, did the ESCRC have a committee of experts assigned to monitor State compliance. See ESCRC, *supra* note 48, arts. 16, 19, 21; E.S.C. Res. 17, U.N. ESCOR, 1985 Sess., Supp. No. 1, at 15, U.N. Doc. E/1985/85 (1986). The ESCRC Committee has been authorized by ECOSOC to formulate general comments. See E.S.C. Res. 5, U.N. ESCOR, 1987 Sess., Supp. No. 1, at 10, U.N. Doc. E/1987/87 (1987); G.A. Res. 102, U.N. GAOR, 42d Sess., Supp. No. 49, at 202, U.N. Doc. A/42/49 (1987).

156. *Supra* note 47.

157. For a description of the critical role of States and the General Assembly's Third Committee in creating a much more restrictive role for the HRC than originally contemplated by the CHR see Farrakh Jhabvala, *The Practice of the Covenant's Human Rights Committee, 1976–82: Review of State Party Reports*, 6 HUM. RTS. Q. 81 (1984).

158. See, e.g., *id.* at 85–86, 88, 95, 104; Andrew C. Byrnes, *The "Other" Human Rights Treaty Body: The Work of the Committee on the Elimination of Discrimination Against Women*, 14 YALE J. INT'L L. 1, 6–7 (1989).

review of periodic State reports on implementation has been conducted primarily with the goal of creating "a constructive dialogue" between the HRC experts and the State Parties.¹⁵⁹ While the experts often ask pointed, probing questions of the State representatives,¹⁶⁰ the HRC's work here is essentially dependent on State cooperation¹⁶¹ — a questionable institutional arrangement for establishing the State's violation of human rights.¹⁶² Indeed, by committee consensus, the HRC reaches no overt committee conclusions whatsoever regarding whether the State has violated any specific obligation. No votes are taken, no committee findings are made, and there are no official majority positions adopted by the HRC regarding the State reports.¹⁶³ Thus, the periodic reporting system is incapable of either providing credible decisions about factual circumstances or authoritative guidance concerning the specific content and meaning of CPRC rights.¹⁶⁴

The HRC and the other committees have also interpreted the power to issue "general comments" narrowly. By consensus, although not without dispute,¹⁶⁵ the HRC's general comments provide no official

159. MCGOLDRICK, *supra* note 154, ¶¶ 2.21, 3.3, 3.5, 3.21; Jhabvala, *supra* note 157, at 88–89; *see also* Byrnes, *supra* note 158, at 19–23 (regarding CEDAW). This dialogue primarily takes place during exchanges between HRC members and State representatives who appear in person before the committee to present the periodic reports and answer questions. MCGOLDRICK, *supra* note 154, ¶ 3.20.

160. MCGOLDRICK, *supra* note 154, ¶¶ 3.4, 3.21, 3.28, 6.3, 10.3, 11.6, 11.8; *see* Donnelly, *supra* note 117, at 610.

161. *See* Byrnes, *supra* note 158, at 4–12.

162. *See* Donnelly, *supra* note 117, at 610 (State reports as a source of information are "flawed" and at times "farcical"); *see also* Jhabvala, *supra* note 157, at 85–88. Although technically the factual information relied upon by the HRC is only submitted by the State Parties or U.N. agencies, in practice the human rights committee experts informally receive and rely on information supplied by non-governmental organizations. *See, e.g.,* Byrnes, *supra* note 158, at 35. Although currently instrumental to the functioning of the human rights system, there are serious institutional questions about extensive reliance on information compiled by non-governmental organizations as an untested basis for U.N. decision-making. *Cf.,* Hurst Hannum, *Fact-Finding by Non-Governmental Human Rights Organizations*, in *FACT-FINDING BEFORE INTERNATIONAL TRIBUNALS*, *supra* note 127, at 293–303 (describing the distinguishing characteristics of fact-finding by non-governmental organizations).

163. MCGOLDRICK, *supra* note 154, ¶¶ 3.21, 3.24; Donnelly, *supra* note 117, at 609.

164. To some degree the individual committee member's views on the specific content and requirements of CPRC rights are discernible from the dialogue and the committee's requests for supplemental information. *See* MCGOLDRICK, *supra* note 154, ¶¶ 3.20, 3.25–28, 10.58, 11.6. In addition, some committee members now routinely submit individual views ("final observations") which evaluate weaknesses in the States' implementation efforts. *Id.* ¶ 3.24; *see also* Manfred Nowak, *UN-Human Rights Committee: Survey of Decisions up to July 1986*, 7 *HUM. RTS. L.J.* 287, 289 (1986). While these sources of opinion could eventually be influential, they are not legally authoritative.

165. McGoldrick gives a detailed account of the on-going debate within the HRC about whether its mandate allows the Committee to find violations of the CPRC or issue country specific reports and comments. MCGOLDRICK, *supra* note 154, ¶¶ 3.29–3.34; *see also* Jhabvala, *supra* note 157, at 92–93, 95, 105.

commentary evaluating particular violations or country-specific conditions.¹⁶⁶ The HRC's mandate to issue such comments, however, provides a potential gold mine of interpretive guidance regarding the CPRC's relatively indeterminate norms.¹⁶⁷ Although this potential has not been completely realized in practice, the HRC's substantive observations about CPRC rights may eventually provide some of the necessary future guidance.¹⁶⁸ The HRC does not, however, render such interpretations by applying CPRC norms to concrete situations — a process essential to providing clear interpretive guidance as to the specific content and meaning of rights. It is difficult to render effective interpretations of sometimes controversial and textually elastic rights, in the context of profound diversity, through abstraction alone.

Most importantly, the States have purposefully not given the HRC, or any other treaty committee, a clear mandate to find violations or pronounce authoritative interpretations.¹⁶⁹ Each committee's views are non-binding recommendations and no committee has any enforcement powers whatsoever — nor direct recourse to other institutions which do.¹⁷⁰ Perhaps as a result of its limited authority, neither the committees' review of State reports nor their general comments appear to have received widespread respect from the State Parties themselves.¹⁷¹ In truth,

166. MCGOLDRICK, *supra* note 154, ¶¶ 3.34–3.44; *see also* Byrnes, *supra* note 158, at 43–46, 49 (neither CERD nor CEDAW have used general comments or “recommendations” to develop substantive interpretations or render country specific findings).

167. *See* Jhabvala, *supra* note 157, at 105; Byrnes, *supra* note 158, at 42–51 (describing general comment interpretations by CERD, CEDAW, and the HRC).

168. *See* MCGOLDRICK, *supra* note 154, ¶¶ 3.29–3.44, 11.25; *see also* Byrnes, *supra* note 158, at 47–49, 51; MERON, *supra* note 57, at 123–26; Opsahl, *supra* note 146, at 21, 31–34.

169. *See* MCGOLDRICK, *supra* note 154, ¶ 3.49; Jhabvala, *supra* note 157, at 84–95, 105; *see also* Byrnes, *supra* note 158, at 12, 17, 46–51; MERON, *supra* note 57, at 10–11, 80–85, 112, 123–25. *See generally* Donnelly, *supra* note 117, at 605–11, 614–18. The lack of mandate is clearly reflected in the HRC's carefully worded justifications for issuing general comments which address the substantive content of CPRC rights. According to the HRC such comments are designed merely to share the HRC's experience — not to serve as authoritative interpretations binding on the States. *See, e.g., Report of the Human Rights Committee, Annex XII, U.N. GAOR, 36th Sess., Supp. No. 40, U.N. Doc. A/36/40 (1981); see also UNITED NATIONS, GENERAL ASSEMBLY, REPORTING OBLIGATIONS OF STATES PARTIES TO UNITED NATIONS INSTRUMENTS ON HUMAN RIGHTS, ¶ 20, U.N. Doc. A/44/98 (1989) [hereinafter REPORTING OBLIGATIONS] (identical wording used by ESCRC Committee).*

170. *See supra* notes 139, 142, 147, 154, 163, 167; *infra* notes 174–78. These deficiencies have been compounded by financial and institutional constraints forcing the committees to limit their work significantly. *See Report on Implementation, supra* note 15, ¶¶ 36–102, 106; REPORTING OBLIGATIONS, *supra* note 169, ¶ 70; REPORT ON THE STATUS OF CERD, *supra* note 51, ¶ 6.

171. In the case of State reports, this lack of respect is perhaps best evidenced by the abundance of overdue and inadequate State reports. *See, e.g., Report on Implementation, supra* note 15, ¶¶ 6–7, 20, 34 (citing 626 overdue reports in 1988 within the U.N. treaty system); REPORTING OBLIGATIONS, *supra* note 169, ¶¶ 11, 22, 55. Even among those States timely submitting reports, many have not taken their obligation to report very seriously. Indeed, many

State incentives to comply are few and ineffective. The limitations of general comments and the periodic reporting system described above are partly intrinsic to non-judicial bodies of experts whose effectiveness is ultimately subject to the cooperation and consent of the parties whose performance they monitor.¹⁷² In any case, neither the treaty bodies' review of State reports nor their general comments enjoy the institutional mandate, earned credentials, or perception of credibility among States necessary to make their work a legitimate basis for actions relating to peace and security.¹⁷³

3. Judicial and Quasi-judicial Procedures

The U.N. human rights treaty system also provides some limited, quasi-judicial administrative procedures for resolving alleged treaty violations, either in the form of State to State complaints or individual communications.¹⁷⁴ Both types of procedures are available only against States which have expressly consented to them.

Interstate procedures, which are currently available under the CPRC, the Convention on the Elimination of All Forms of Racial Discrimination, and the Convention Against Torture,¹⁷⁵ would appear to have strong

States have (perhaps naturally) merely submitted cursory, self-congratulatory reports which vaguely describe general conditions in their country, recite formal legal enactments, or disingenuously assert that all human rights outlined in the treaty are already fully guaranteed by the existing domestic legal system. See MCGOLDRICK, *supra* note 154, ¶¶ 3.4, 3.12; Byrnes, *supra* note 158, at 14 nn.41–42, 22–28; Jhabvala, *supra* note 157, at 89–91, 102–03; *Report on Implementation*, *supra* note 15, ¶ 34. Moreover, there is scant evidence that State Parties have paid serious attention to any committee's suggestions of the need for concrete changes in their domestic legal system to meet treaty obligations. MCGOLDRICK, *supra* note 154, ¶¶ 3.44–3.49; Jhabvala, *supra* note 157, at 95, 102–04; Scott Leckie, *An Overview and Appraisal of the Fifth Session of the UN Committee on Economic, Social and Cultural Rights*, 13 HUM. RTS. Q. 545, 547 (1991); see also Byrnes, *supra* note 158, at 65–66; Opsahl, *supra* note 146, at 33–34. But see Cindy A. Cohn, *The Early Harvest: Domestic Legal Changes Related to the Human Rights Committee and the Covenant on Civil and Political Rights*, 13 HUM. RTS. Q. 295 (1991) (suggesting that at least on a formal level many States have claimed or promised to make domestic changes in order to comply with the CPRC).

172. See Byrnes, *supra* note 158, at 4–7; Jhabvala, *supra* note 157, at 85–95, 104; see also MCGOLDRICK, *supra* note 154, ¶¶ 2.21–2.22. The committees monitoring CERD and CEDAW have made even more restrictive choices than the HRC regarding review of State reports and general comments. See Byrnes, *supra* note 158, at 18–28, 43–46, 49; Donnelly, *supra* note 117, at 630–35. One commentator has rather optimistically reported that the ESCRC Committee, in contrast, has taken an expansive view of its mandate. See Leckie, *supra* note 171, at 545–49, 555–56, 558–61.

173. Practices regarding State reports and general comments under the ESCRC, CERD, and CEDAW vary in detail but are identical in substance to those of the HRC. See Byrnes, *supra* note 158, at 4, 14, 23, 25–26, 47–49, 56–57, 65–66. Each treaty also appears to suffer from similar weaknesses in mandate, procedures, and credibility.

174. See *supra* note 155.

175. *Id.*; CPRC, *supra* note 47, art. 41; CERD, *supra* note 49, arts. 11–13; CAT, *supra* note 133, art. 21.

potential both for establishing the factual predicates for subsequent human rights-based collective security actions and for rendering meaningful interpretations of rights. Unfortunately, very few States have consented to these procedures, and they have never been utilized.¹⁷⁶

Individual petitions are currently available under the CPRC's Optional Protocol, the Convention on the Elimination of All Forms of Racial Discrimination, and the Convention Against Torture.¹⁷⁷ Since it is highly unlikely that such petitions — unless submitted in massive numbers — would establish human rights violations posing threats to peace, their primary significance for present purposes lies in their potential for giving specific content to critical rights. Indeed, at present these procedures represent the only opportunity within the U.N. system for interpretive guidance based upon the application of rights to concrete, pending controversies.¹⁷⁸

Although providing this unique opportunity, the treaty system's individual petition procedures suffer from serious limitations in this regard. First, as with interstate complaints, the scope of jurisdiction is quite limited, involving only disputes under the relevant treaty and among the relatively limited number of States agreeing to the individual communication procedures.¹⁷⁹ Second, as is true with the committees' other activities, the individual complaint procedures give the committees extremely limited authority. The committees' "views" on alleged violations and appropriate remedies are non-binding and the committees have neither enforcement power of their own nor direct recourse to other institutions which do.¹⁸⁰ The committees' views in any particular case, including its interpretations of the rights involved, do not technically

176. For example, as of 1989 only 23 States recognized the HRC's competence to handle interstate complaints and no State had ever brought one. Opsahl, *supra* note 146, at 21.

177. CPRC Optional Protocol, *supra* note 155, art. 1; CERD, *supra* note 49, art. 14; CAT, *supra* note 133, art. 22.

178. In principle, the International Court of Justice could also resolve such concrete disputes. See *infra* text accompanying notes 183–91.

179. There are currently 50 State Parties to the CPRC's Optional Protocol. See *supra* note 51. Only 14 States have accepted individual communication procedures under CERD. *Id.* CAT has been ratified or acceded to by 52 States — 23 of which have declared the CAT Committee's competence to consider individual "communications." UNITED NATIONS, GENERAL ASSEMBLY, TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT; STATUS OF THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT; REPORT OF THE SECRETARY-GENERAL, ¶ 5-6, U.N. Doc. A/45/405 (1990).

180. See, e.g., MCGOLDRICK, *supra* note 154, ¶¶ 3.49, 4.38–4.39; MERON, *supra* note 57, at 46; CAT, *supra* note 155, art. 22(7). Opsahl, who for ten years served on the HRC, has noted that although "not even theoretically binding," the HRC's "views" are "normally accepted" by the State. Opsahl, *supra* note 146, at 22; see also Dominic McGoldrick, *Canadian Indians' Cultural Rights and the Human Rights Committee*, 40 INT'L & COMP. L.Q. 658, 667 (1991).

create precedent binding on other States subject to the procedures — much less other parties to the treaty.¹⁸¹ Third, the process by which the committees arrive at their views in individual cases lacks many of the institutional attributes necessary to engender State respect and, in turn, voluntary compliance with their decisions. Besides the limitations on institutional authority described above, the procedures suffer from extremely weak fact-finding mechanisms.¹⁸² Moreover, the committees have historically demonstrated only a marginal capacity to create an effective jurisprudence regarding either the interpretation process or the substantive content of the rights they apply.¹⁸³ The committees' weaknesses in this regard are conceivably the result of the inherent limitations of institutions comprised of non-judicial experts from extremely diverse backgrounds working under governmental pressures and on the basis of consensus decision-making.¹⁸⁴

In this regard, the committees stand in sharp contrast to the only truly judicial forum at the United Nations, the International Court of Justice (ICJ).¹⁸⁵ As a potential forum for interpreting rights and credibly determining violations, the ICJ has many of the institutional attributes necessary for authoritative, credible decision-making.¹⁸⁶ Indeed, the

181. See *supra* note 180.

182. See, e.g., Opsahl, *supra* note 146, at 23; MCGOLDRICK, *supra* note 154, ¶¶ 4.23–4.26; Roger S. Clark, *Legal Representation*, in *INTERNATIONAL LAW AND FACT-FINDING IN THE FIELD OF HUMAN RIGHTS*, *supra* note 105, at 114–17. For example, the committees' fact-finding typically consists only of receiving written responses submitted by government officials and the alleged victim: there is no provision for oral testimony, no rules of evidence, and very little follow up. See, e.g., MCGOLDRICK, *supra* note 154, ¶¶ 4.23–4.26.

183. For example, the HRC has expressed an intention to utilize certain interpretive principles that mirror those in the Vienna Convention on Treaties. See MCGOLDRICK, *supra* note 154, ¶¶ 4.46–4.47, 8.27–8.28. Yet the Committee's general comments and State report "dialogues" leave unclear whether the HRC views the interpretation process as one which focuses primarily on original intent of the State Parties, emphasizes treaty language as dispositive, takes a teleological orientation in which the purposes of the treaty and the rights declared are used as central interpretive guides, or utilizes some combination of these or other approaches. See MCGOLDRICK, *supra* note 154, ¶¶ 3.29–3.35, 4.47, 8.28. Nor has the HRC clearly dealt with the issues of national discretion and cultural diversity when interpreting the substance of rights. See, e.g., *id.* ¶¶ 4.46–4.48, 6.1–6.10, 9.11–9.15, 10.59–10.61. This weakness is also reflected in the committee's ad hoc approach to cases and its common failure to issue cohesive, coherent written opinions providing an underlying rationale for its views on alleged violations of the treaty's provisions. See, e.g., *id.* ¶¶ 9.16–9.18, 9.29–9.31.

184. See *supra* notes 152–53.

185. U.N. CHARTER arts. 1, 7, 36, 92–96. See generally *THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS* (Lori F. Damrosch ed., 1987) [hereinafter *CROSSROADS*].

186. Strong international ambivalence towards the ICJ has persisted, however, particularly regarding its appropriateness as a forum for resolving so-called "political" disputes. See generally *CROSSROADS*, *supra* note 185, pt. II. Some States have also questioned the Court's impartiality and criticized the process by which judges are selected. See Fred L. Morrison, *The Future of International Adjudication*, 75 MINN. L. REV. 827, 827–38, 841–43 (1991); see also Monroe Leigh & Stephen D. Ramsey, *Confidence in the Court: It Need Not Be a "Hollow*

World Court would appear uniquely situated to deliver dispositive, impartial, and authoritative decisions relating to human rights disputes and violations which may threaten international peace.¹⁸⁷ The ICJ also has a well-developed jurisprudence and has historically demonstrated a capacity for rendering authoritative interpretations of treaties and customary international law.

As currently situated, however, the ICJ's potential role in interpreting human rights and determining the factual predicates for international action based upon their violation is extremely limited. Beyond some lingering questions about impartiality,¹⁸⁸ the primary source of this limitation lies in the restrictive scope of the ICJ's jurisdiction. Recourse to the Court is limited to State parties which have consented to its jurisdiction and select international organizations.¹⁸⁹ In principle, States agreeing to the ICJ's jurisdiction — whether by declaration accepting compulsory jurisdiction, by treaty, or by ad hoc agreement — could seek application and interpretation of human rights norms by suing each other before the ICJ.¹⁹⁰ However, even assuming fulfillment of the conditions necessary for such contentious jurisdiction, no State currently possesses either the political will or confidence in the Court necessary to bring cases on behalf of individuals or groups for human rights violations occurring in other countries.¹⁹¹ The same can be said about the potential

Chamber", in *CROSSROADS*, *supra* note 185, at 106–22; Abraham D. Sofaer, *Statement by the Legal Advisor, Abraham Sofaer, to the Senate Foreign Relations Committee*, reprinted in *INTERNATIONAL LAW* at 298–300 (Barry E. Carter & Phillip R. Trimble eds., 1991).

187. See, e.g., *Legal Consequences for States of the Continued Presence of South Africa in Namibia (Southwest Africa) Notwithstanding Security Council Resolution 276*, 1971 I.C.J. 16 (June 21); *Western Sahara Advisory Opinion*, 1975 I.C.J. 12 (October 16); see also *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.S.)*, 1992 I.C.J. 114 (April 14) (request for provisional measures), reprinted in 31 I.L.M. 665 (1992); Richard B. Bilder, *International Dispute Settlement and the Role of International Adjudication*, in *CROSSROADS*, *supra* note 185, at 155–80 (describing advantages, disadvantages, and distinguishing characteristics of adjudication of international disputes).

188. See *supra* note 186.

189. Statute of the International Court of Justice, June 26, 1945, arts. 34(1), 36, 65(1), 59 Stat. 1031, 1059–60, 1063, 3 Bevans 1153 [hereinafter ICJ Statute]; see also U.N. INTERNATIONAL COURT OF JUSTICE at 6–7, 10–12, U.N. Sales No. E.69.I.18 (1969). Proposed HRC authority to seek ICJ advisory opinions was specifically rejected by the General Assembly's Third Committee during the CPRC's drafting process. See Jhabvala, *supra* note 157, at 84.

190. See ICJ Statute, *supra* note 189, art. 36.

191. See Opsahl, *supra* note 146, at 18. But see Carter & Trimble, *supra* note 186, at 273 (discussing a Soviet proposal to subject interpretation disputes under six major human rights treaties to ICJ compulsory jurisdiction). ICJ adjudication of human rights violations might also raise complex issues of standing, injury, and appropriate remedy. The State Parties' claim would essentially be that another State's violation of the human rights of its own citizens within its own borders breached an international obligation to the claimant State.

for advisory opinions sought by U.N. institutions.¹⁹² Thus, without significant reform, including changes to the ICJ's jurisdictional rules, the Court is unlikely to play a significant role in interpreting human rights standards and determining their violation in the near future.¹⁹³

C. *Central Flaws in the International Human Rights Decision-making and Interpretation Process*

Three central characteristics of the U.N.'s human rights regime must be addressed if human rights considerations are to play a prominent and positive peace keeping role in a reformed United Nations. First, and perhaps most importantly, the U.N.'s existing interpretation and decision-making process is too decentralized and badly in need of rationalization. There is, for example, no central United Nations body with the singular authority to interpret and apply a unified set of international human rights norms thought binding on all nations. Instead, for each of the possible sources of State obligation there are distinct, but often overlapping, sources of decision-making and interpretation — none of which is authoritative.¹⁹⁴ This dilution of responsibility and lack of authority ultimately undermines the credibility and effectiveness of both the norms and institutions involved. Moreover, it means that the system lacks a coherent, authoritative voice with the institutional credentials and mandate to generate interpretations of the meaning and specific content of rights and to render credible, impartial decisions regarding their application that can engender State respect and compliance. In sum, the United Nations' human rights regime speaks with too many feeble voices.

Second, existing human rights institutions lack sufficient mechanisms for developing the needed interpretations of rights and rendering credible decisions regarding their violation. As described in Part III.B., the primary opportunities for human rights decision-making by Charter-based institutions are ill-suited to credible fact-finding or developing authoritative interpretations of the specific requirements of rights.¹⁹⁵ Multilateral treaty-based mechanisms, such as periodic State reporting procedures and general comments, have been too narrowly construed by the relevant

192. ICJ advisory opinions could be particularly useful in the context of giving authoritative legal content to controversial rights such as the right to self-determination — or in resolving conflicts between rights. At present, however, U.N. institutions authorized to seek such opinions appear to lack confidence in the Court and the political will to bring such cases. This lack of confidence is perhaps not surprising since all of the international organizations authorized to bring such cases are political bodies which directly reflect States' interests. *See supra* notes 149, 152–53.

193. *Cf. Opsahl, supra* note 146, at 18, 29.

194. *See supra* text accompanying notes 102–12, 132–37, 147, 152–56, 167–70, 178.

195. *See supra* text accompanying notes 132–53.

institutions and State Parties to fulfill these roles. Interstate and individual complaint procedures such as the CPRC's Optional Protocol have greater potential for providing the needed interpretations of rights, but the treaty-based monitoring bodies have neither the authority, jurisdictional scope, nor institutional characteristics likely to generate widespread State respect and compliance. Perhaps most importantly, the entire U.N. human rights system suffers from a cumbersome, flawed fact-finding process.¹⁹⁶ Ultimately, if human rights considerations are to play a prominent role in U.N. peace keeping activities, more effective procedures for fairly presenting concrete cases and situations to an authoritative fact-finder must be developed.¹⁹⁷

Third, existing U.N. institutions have yet to develop a sufficient jurisprudence regarding the decision-making, fact-finding and interpretation process itself. Widely accepted rules governing this critical process are crucial to the ultimate legitimacy of any institution's decisions.¹⁹⁸ Especially important in this regard is the system's failure to develop any sound approach to the problematic implications of profound diversity.¹⁹⁹ Many writers have described the importance of context and culture to a society's values and in turn its understanding about the meaning and content of international human rights norms.²⁰⁰ As the international human rights system increasingly turns its attention to issues of implementation and enforcement, the potential for such culturally and politically based conflicts will greatly increase, especially as rights take on more concrete meaning. Such conflicts also reflect an unresolved tension between the need to recognize and respect diversity versus the need for universal specific content for human rights — a tension which poses potentially enormous problems for any meaningful international

196. See *supra* text accompanying notes 145–46, 162, 180.

197. Arguably these mechanisms could be modeled after existing regional judicial or quasi-judicial forums, such as those effectively utilized by the European and Inter-American human rights regimes. See Opsahl, *supra* note 146, at 29.

198. See *supra* text accompanying notes 20–21, 28, 37, 114, 117–29.

199. An important factor in achieving State compliance with international human rights is the conformity of those rights to the cultural, social, and political context of the particular State. See An-Na'im, *supra* note 59. In this regard, Thomas Franck describes "symbolic validation" as one condition for an international rule's "legitimacy." At least in part, Franck means that a rule which is "culturally authentic" has a greater capacity "to communicate in the context of a particular time and place and to a certain population". See Franck, *Prospects*, *supra* note 1, at 632 n.117; FRANCK, LEGITIMACY, *supra* note 16, at 91–96. It seems self-evident that rights which conform to the cultural, social, and political expectations of a given society will be more meaningful to that society and more likely to be fully implemented and enforced. Indeed, some authors have suggested that in order for rights to be effective, the cultural, social, and political context is and should be the primary determinant of what rights mean. See Pollis & Schwab, *supra* note 46. But see Rhoda E. Howard, *Dignity, Community, and Human Rights*, in PERSPECTIVES, *supra* note 57, at 81.

200. See *supra* notes 80–81, 129.

enforcement of human rights norms.²⁰¹ U.N. institutions have failed to develop a conceptual approach to address this tension, much less a jurisprudence which provides mediating techniques through which legitimate variations in rights might be accommodated while at the same time providing the requisite degree of universality. If human rights, and in particular rights of democratic participation, are to figure positively and prominently in U.N. efforts to secure world peace, such techniques — particularly in the interpretation and monitoring process — must be devised by the international human rights system.

CONCLUSION: HUMAN RIGHTS AND THE PEACE
KEEPING PROCESS — AN ENFORCEMENT VERSUS
PROMOTIONAL MODEL OF REFORM

As described above, the U.N. human rights regime currently lacks the well-defined, commonly understood norms, authoritative interpretive processes, and credible decision-making which are essential to effective international norms and institutions. These normative and institutional weaknesses have direct implications for the potential role of human rights in preserving international peace and security. Critical to the success of any enforcement-oriented reform model, for example, would be the need for a centralized, coherent decision-making process which could authoritatively interpret the specific content and meaning of indeterminate human rights norms and credibly resolve factual disputes. If, as many reformers suggest, human rights considerations ought to be utilized as the basis for various collective actions by the U.N.'s political institutions,²⁰² then realistic, radical institutional development would be necessary to rationalize the system's normative and institutional decision-making hierarchy.

Attempts to enforce ill-defined and controversial norms whose specific content and meaning have been insufficiently developed through an accepted, credible decision-making process, will be regarded as illegitimate by the international community and will stand little chance of engendering widespread State respect or compliance.²⁰³ The existing U.N.

201. See generally Donoho, *supra* note 55, at 386–91.

202. See *supra* text accompanying notes 8–15.

203. At present even the selection of which rights should be deemed sufficiently important to peace to justify collective action would be fraught with disagreement and controversy reflecting unresolved conflicts between States over basic social and cultural priorities. All of the most likely candidates, such as self-determination, political participation, or so-called "democratic entitlement" rights, are among those rights most susceptible to cultural and political variations and least susceptible to specific definitions that could be well-understood and universally accepted among diverse States. Agreement on a set of rights will be particularly difficult to achieve so long as the international legal system relies predominately on principles of sovereignty, State equality, and consensual obligation.

institutional framework for interpreting and monitoring human rights is incapable of providing the guidance, specific content, or fact-finding necessary to legitimize collective enforcement actions based upon such rights. In essence, human rights as currently constituted are insufficiently mature to serve as a basis for collective enforcement actions. Without radical institutional reforms it would appear that only an increased promotional role for international human rights in the peace keeping efforts of the United Nations is realistic.

Ultimately, the central underlying issue is defining the role of international human rights and human rights institutions in the world governing process. Expanding the role of human rights in the peace keeping process would require that international human rights institutions move dynamically from the overtly political, weak supervisory capacity they now serve to a much more authoritative role in which their interpretations of the specific content and meaning of rights would be implemented by the U.N.'s political organs to promote peace and security. As currently situated however, it is clear that most of the international community strongly favors vaguely worded norms and the extremely weak international supervisory role of the U.N.'s human rights institutions.

Whatever the future role of U.N. human rights institutions in promoting peace, reforms designed to address the weaknesses described above are imperative to the ultimate effectiveness of human rights generally. Hopefully, such a reform process will eventually help the international community arrive at a greater understanding of the meaning and specific content of those rights most important to world peace. Ultimately, such reform may allow these norms to serve the prominent role urged by some commentators.

